S & M JEWELLERY TRADING SDN BHD & ORS v. FUI LIAN-KWONG HING SDN BHD

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
JEFFREY TAN FCJ
MOHAMED APANDI ALI FCJ
[CIVIL APPEAL NO: 02-24-04-2012(W)]
25 AUGUST 2015

LANDLORD AND TENANT: *Lease – Agreement – Termination of sub-lease on ground of non-registration – Whether rendered sub-lease void – Whether registration of sub-lease was root of agreement – Whether delay in registration amounted to fundamental breach – Whether parties regulated by terms of unregistered sub-lease – Whether tenant entitled to terminate agreement – Whether notice of termination amounted to repudiatory breach*

LANDLORD AND TENANT: *Lease – Termination – Unregistered sub-lease – Whether registration was root of agreement – Whether notice of termination amounted to repudiatory breach – Whether loss suffered by landlord was periodic tenancy from year to year – Whether lease could be specifically enforced – Whether landlord was only entitled to damages in lieu of notice of termination*

LANDLORD AND TENANT: *Lease – Non-registration – Whether becomes tenancy at will – Whether tenancy at will changes into periodic tenancy upon payment of rent – Whether unregistered lease treated as sub-lease in equity – Whether equity could compel specific performance of sub-lease – Whether rights of proprietor was as per lease*

By a sub-lease and guarantee agreement ('the agreement'), the respondent as the registered lessee, sub-leased certain floors of a seven storey building to the first appellant for a term of 25 years *ie*, from 1 May 2006 to 16 October 2031. The second, third and fourth appellants were the sureties for the first appellant. It was a provision in the agreement, *inter alia*, that the respondent shall execute and deliver to the first appellant a valid and registrable memorandum of sub-lease in the prescribed form under the National Land Code ('NLC'). On 13 May 2009, the first appellant served notice of termination of the agreement on the ground of non-registration of the sub-lease and the appellants subsequently filed an action against the respondent, seeking, *inter alia*: (i) a declaration that the sub-lease was void for non-registration; (ii) a declaration that the termination of the agreement and/or of the tenancy at will was valid and binding; and (iii) a declaration that the guarantees of the second, third and fourth appellants were void. The respondent responded with a counterclaim which sought: (i) a declaration that the termination of the agreement was unlawful and/or ineffective to

terminate the sub-lease; (ii) a declaration that the sub-lease remained in force; and (iii) a declaration that the appellants remained liable to perform the agreement. In its reply, the appellants pleaded that the sub-lease 'was void for non-registration ... and that the appellants had lawfully terminated the tenancy at will'. By defence to the counterclaim, the appellants pleaded that the failure to register the sub-lease was a fundamental breach. Subsequently, on 8 June 2009, the respondent presented the sub-lease for registration and on 29 September 2009 applied for summary judgment against the appellants on the counterclaim. The High Court allowed the application for summary judgment and granted the declarations sought by the respondent, *ie*, (i) that the termination of the sub-lease was unlawful and ineffective; and (ii) that the sub-lease was still valid and binding on the appellants to perform. It was held by the High Court that by reason of non-registration 'the lease was void and hence a relationship of tenancy at will was created'. Without expanding on the tenancy at will that it said was created, the High Court reasoned that 'there was no fundamental breach ... there was no total failure of consideration' as there was a tenancy at will, and that the termination of the agreement was therefore invalid. The appellants appealed to the Court of Appeal whilst the respondent cross-appealed against the part of the decision of the High Court which held that the sub-lease was void for non-registration. In the Court of Appeal, the respondent contended that pending the registration of the sub-lease, an equitable lease was in existence. However, the appellants argued that whether it was in existence or not was a triable issue. The parties did not dispute that there was a tenancy at will but whether it was a yearly or monthly tenancy at will. The Court of Appeal held that the appellants had not raised any triable issues and that the sub-lease was void for non-registration and that the tenancy was a yearly tenancy. The Court of Appeal also held that the notice dated 13 May 2009 was a notice to terminate the agreement but not a notice to terminate a tenancy at will and that the respondent could not be entirely faulted for the delay in registration of the sub-lease. In allowing the cross-appeal by the respondent, the Court of Appeal held that the sub-lease, though void for non-registration, remained valid as an equitable lease. Hence, the appellants appealed. The sole question upon which leave was granted to appeal against the order of the Court of Appeal was 'if a lease or sub-lease (exceeding three years) is rendered void by reason of want of registration under the provisions of the NLC, does the lease or sub-lease become: (i) a tenancy at will and if so for what period; or (ii) an equitable sub-lease and if so, for what period'.

Held (allowing appeal in part)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) A lease or sub-lease (exceeding three years) is not rendered void by reason of non-registration but is imperfect without registration. Unless perfected, it will not operate to transfer title to the lessee or sub-lessee. An agreement for a lease does not create a relationship of landlord and tenant. If the tenant is let into possession under the imperfect lease or

sub-lease, he becomes a tenant at will. A tenancy at will is determinable at the will of either party, and being such it cannot co-exist with a periodic tenancy or an equitable lease. When the tenant pays or expressly agrees to pay rent, the tenancy at will changes into periodic tenancy upon the terms of the intended lease or sub-lease, that is, from year to year or for other periodic period, according to the computation of the rent. Where appropriate, equity may treat an agreement for lease as an equitable lease, that is, treat the unregistered lease as registered, and compel specific performance against the proprietor. (para 54)

(2) The first appellant was let into occupation long before execution of the sub-lease. There were no issues between the parties over the sub-lease, notwithstanding the delay in registration of the sub-lease. The first appellant had not bothered to issue a notice fixing a reasonable time for the registration of the sub-lease, which should not be so if the registration of the sub-lease were in peril or in doubt. It would not appear that delay in registration of the sub-lease was a fundamental breach that went to the root of the agreement. (para 47)

(3) In the absence of fundamental breach by the respondent, the first appellant was not entitled to terminate the agreement. Thus, the notice of termination amounted to repudiatory breach by the first appellant. Refusal to pay rent after June 2009 plus the abandonment of the demised premises wholly substantiated that the first appellant had repudiated the agreement which entitled the respondent to rescind the agreement and sue for damages. (para 48)

(4) The first appellant had long been in occupation of the demised premises and paid the rent reserved which was accepted by the respondent. There was a relationship of landlord and tenant between the parties that was apparently regulated, for both parties conducted themselves as so bound, by the terms of the unregistered sub-lease. Since it was regulated by the terms of the unregistered sub-lease, the relationship between the parties could not be determinable at will of either the first appellant or the respondent. Therefore, the relationship was not, for it was beyond, a tenancy at will. (para 49)

(5) The first appellant had expended substantial sums towards renovation of the demised premises, and sublet the demised premises, all that with the consent of the respondent, the circumstances were clearly such that equity could compel specific performance of the sub-lease which would be treated as if registered. The circumstances were clearly such that the sub-lease, although not registered in law, could be treated as a sub-lease in equity and could be enforced by the purchaser, by a decree of specific performance against the proprietor. (para 49)

(6) The interest of the respondent was solely financial. Besides, it was the tenant (the first appellant) who acquired the equity to protect his occupation. It would be unjust to turn the equitable lease for the full term against the tenant to secure rent for the proprietor (respondent). On balance, it would not seem that specific performance could be granted against the first appellant. Rather, where there is an equitable lease, the rights of the proprietor are as per the lease, *albeit* unregistered. (para 50)

(7) The loss that the respondent suffered by reason of repudiation was the periodic tenancy. As there was an equity in favour of the first appellant, it could not be a tenancy from month to month. The courts have a great inclination to make every tenancy a holding from year to year. Where a tenancy is created by express agreement, the general rule at common law is that half a year's notice must be given expiring at the end of the first or some other year of the tenancy. The same rule applies where a tenancy from year to year is implied by law from the payment and acceptance of rent, or from other circumstances. Accordingly, the respondent was entitled to six months' notice of termination of the periodic tenancy from year to year. A period of six months should also be reasonable time for the respondent to secure another tenant. The notice of the first appellant which effectively terminated both agreement and periodic tenancy was five months short. (paras 52 & 53)

(8) The lease which was acquired by the first appellant could not be specifically enforced against the first appellant for the rent for the full term. The respondent, therefore, was only entitled to damages *in lieu* of notice of termination of the periodic tenancy from year to year. (para 55)

Bahasa Malaysia *Translation Of Headnotes*

Melalui satu perjanjian pajakan kecil dan jaminan ('perjanjian'), responden sebagai pemajak berdaftar, memajak semula tingkat-tingkat tertentu sebuah bangunan tujuh tingkat kepada perayu pertama bagi tempoh 25 tahun iaitu dari 1 Mei 2006 sehingga 16 Oktober 2031. Perayu kedua, ketiga dan keempat adalah penjamin bagi perayu pertama. Adalah diperuntukkan dalam perjanjian, antara lain, bahawa responden mesti memeterai dan menyerahkan kepada perayu pertama, memorandum pajakan kecil yang sah dan boleh didaftarkan dalam borang yang diperuntukkan di bawah Kanun Tanah Negara ('KTN'). Pada 13 Mei 2009, perayu pertama menyerahkan notis penamatan perjanjian atas alasan kegagalan mendaftar pajakan kecil tersebut dan perayu-perayu kemudiannya memfailkan suatu tindakan terhadap responden, memohon, antara lain: (i) deklarasi bahawa pajakan kecil tersebut tidak sah kerana tidak didaftarkan; (ii) deklarasi bahawa penamatan perjanjian dan/atau penyewaan ikut ihsan adalah sah dan mengikat; dan (iii) deklarasi bahawa jaminan oleh perayu kedua, ketiga dan keempat adalah tidak sah. Responden membalas dengan tuntutan balas yang memohon: (i) deklarasi bahawa penamatan perjanjian tersebut adalah tidak sah dan/atau tidak mempunyai kesan menamatkan pajakan kecil; (ii) deklarasi bahawa

pajakan kecil masih berkuatkuasa; dan (iii) deklarasi bahawa perayu-perayu kekal bertanggungjawab melaksanakan perjanjian tersebut. Dalam jawapannya, perayu-perayu memohon bahawa pajakan kecil 'adalah tidak sah kerana tidak didaftarkan ... dan bahawa perayu-perayu telah menamatkan penyewaan ikut ihsan secara sah'. Sebagai pembelaan kepada tuntutan balas, perayu-perayu memplidkan bahawa kegagalan untuk mendaftarkan pajakan kecil tersebut adalah kemungkiran asas. Kemudian, pada 8 Jun 2009, responden mengemukakan pajakan kecil tersebut untuk pendaftaran dan pada 29 September 2009 memohon untuk penghakiman terus terhadap perayu-perayu bagi tuntutan balas. Mahkamah Tinggi membenarkan permohonan penghakiman terus dan membenarkan deklarasi-deklarasi yang dipohon oleh responden, iaitu, (i) bahawa penamatan pajakan kecil adalah tidak sah dan tidak berkesan; dan (ii) bahawa pajakan kecil tersebut masih sah dan mengikat perayu-perayu bagi pelaksanaannya. Mahkamah Tinggi memutuskan bahawa oleh sebab tidak didaftarkan 'pajakan tersebut adalah tidak sah dan oleh itu hubungan penyewaan ikut ihsan diwujudkan'. Tanpa menjelaskan lanjut berkenaan penyewaan ikut ihsan yang dikatakan telah diwujudkan, Mahkamah Tinggi menyatakan bahawa 'tidak ada kemungkiran asas ... tidak ada kegagalan mutlak balasan' kerana terdapat penyewaan ikut ihsan, dan bahawa penamatan perjanjian oleh itu adalah tidak sah. Perayu-perayu merayu ke Mahkamah Rayuan manakala responden merayu balas terhadap bahagian keputusan Mahkamah Tinggi yang memutuskan bahawa pajakan kecil tersebut adalah tidak sah kerana tidak didaftarkan. Di Mahkamah Rayuan, responden menghujahkan bahawa sementara menunggu pendaftaran pajakan kecil tersebut, pajakan dari segi ekuiti telah wujud. Walau bagaimanapun, perayu-perayu menghujahkan bahawa sama ada ia wujud atau tidak, bukanlah isu yang boleh dibicarakan. Pihak-pihak tidak mempertikaikan bahawa terdapat penyewaan ikut ihsan tetapi sama ada ia adalah penyewaan ikut ihsan tahunan atau bulanan. Mahkamah Rayuan memutuskan bahawa perau-perayu tidak membangkitkan isu-isu yang boleh dibicarakan dan bahawa pajakan kecil tersebut tidak sah kerana tidak didaftarkan dan penyewaan tersebut adalah penyewaan tahunan. Mahkamah Rayuan juga memutuskan bahawa notis bertarikh 13 Mei 2009 adalah notis untuk menamatkan perjanjian tetapi bukan notis untuk menamatkan penyewaan ikut ihsan dan bahawa responden tidak boleh disalahkan keseluruhannya bagi kelewatan dalam pendaftaran pajakan kecil tersebut. Dalam membenarkan rayuan balas oleh responden, Mahkamah Rayuan memutuskan bahawa pajakan kecil tersebut, walaupun tidak sah kerana tidak didaftarkan, kekal sah sebagai pajakan ekuiti. Oleh itu perayu-perayu merayu. Satu-satunya persoalan undang-undang untuk memberikan kebenaran merayu terhadap perintah Mahkamah Rayuan adalah 'jika pajakan atau pajakan kecil (melampaui tiga tahun) dianggap tidak sah kerana tidak didaftarkan di bawah peruntukan KTN, adakah pajakan atau pajakan kecil tersebut menjadi: (i) penyewaan ikut ihsan dan jika demikian apakah tempohnya; atau (ii) pajakan kecil ekuiti dan jika demikian, apakah tempohnya'.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Sesuatu pajakan atau pajakan kecil (melampaui tiga tahun) tidak dikatakan tidak sah atas alasan tidak didaftarkan tetapi adalah tidak sempurna tanpa pendaftaran. Kecuali ia disempurnakan, ia tidak akan berfungsi untuk memindahkan hak milik kepada pemajak atau pemajak kecil. Suatu perjanjian bagi pajakan tidak membentuk hubangan tuan tanah dan penyewa. Jika penyewa diberikan milikan di bawah pajakan atau pajakan kecil yang tidak sempurna, dia menjadi penyewa ikut ihsan. Penyewaan ikut ihsan boleh dibatalkan atas ihsan salah satu pihak, dan dengan itu ia tidak boleh wujud bersama-sama dengan penyewaan bertempoh atau pajakan ekuiti. Apabila penyewa membayar atau bersetuju secara jelas untuk membayar hutang, penyewaan ikut ihsan bertukar kepada penyewaan bertempoh berdasarkan tempoh dalam pajakan atau pajakan kecil yang diniatkan, iaitu, dari setahun ke setahun atau tempoh lain, mengikut pengiraan sewa. Di mana wajar, ekuiti boleh menganggap suatu perjanjian untuk pajakan sebagai pajakan ekuiti, iaitu, menganggap pajakan yang tidak didaftarkan sebagai telah didaftarkan, dan memaksa pelaksanaan spesifik terhadap pemilik.

(2) Perayu pertama diberi milik sewaan lama sebelum pemeteraian pajakan kecil tersebut. Tidak ada isu antara pihak-pihak berkaitan dengan pajakan kecil, walaupun terdapat kelewatan dalam pendaftaran pajakan kecil tersebut. Perayu pertama tidak mengambil peduli untuk mengeluarkan notis menetapkan tempoh yang munasabah bagi pendaftaran pajakan kecil tersebut, yang tidak sepatutnya berlaku jika pendaftaran pajakan kecil tersebut berisiko atau meragukan. Jelas bahawa kelewatan pendaftaran pajakan kecil bukan kemungkiran penting yang menjejaskan asas perjanjian.

(3) Tanpa kemungkiran asas oleh responden, perayu pertama tidak berhak menamatkan perjanjian. Oleh itu notis penamatan membentuk kemungkiran ingkar oleh perayu pertama. Keingkaran untuk membayar sewa selepas Jun 2009 ditambah dengan pengabaian premis tersebut secara keseluruhannya menyokong bahawa perayu pertama telah membatalkan perjanjian tersebut yang memberi hak kepada responden untuk membatalkan perjanjian dan menyaman untuk ganti rugi.

(4) Perayu pertama telah lama menduduki premis tersebut dan membayar sewa yang diperuntukkan, yang telah diterima oleh responden. Wujud hubungan tuan tanah dan penyewa antara pihak-pihak yang jelas terlaras, bagi kedua-dua pihak bertindak seperti terikat oleh terma-terma pajakan kecil. Oleh sebab ia dilaraskan oleh terma-terma pajakan kecil yang tidak didaftarkan, hubungan antara pihak-pihak tidak boleh ditentukan atas ihsan sama ada perayu pertama atau responden. Oleh itu, hubungan tersebut bukan, kerana ia melampaui, penyewaan ikut ihsan.

(5) Perayu pertama telah membelanjakan sejumlah besar bagi pengubahsuaian premis tersebut, dan menyewakan semula premis tersebut, dengan persetujuan responden, keadaan yang jelas di mana ekuiti boleh memaksa pelaksanaan spesifik pajakan kecil yang akan dianggap sebagai telah didaftarkan. Hal keadaan adalah jelas bahawa pajakan kecil tersebut, walaupun tidak didaftarkan dari segi undang-undang, boleh dianggap sebagai pajakan kecil dalam ekuiti dan boleh dikuatkuasakan oleh pembeli, dengan perintah pelaksanaan spesifik terhadap pemilik.

(6) Kepentingan responden adalah semata-mata dari segi kewangan. Malahan, penyewa (perayu pertama) yang memperoleh ekuiti untuk melindungi pendudukannya. Akan menjadi tidak adil untuk menukar pajakan ekuiti bagi tempoh penuh terhadap penyewa untuk mendapatkan sewa bagi pemilik (responden). Atas imbangan, pelaksanaan spesifik tidak boleh diberikan terhadap perayu pertama. Sebaliknya, di mana wujud pajakan ekuiti, hak pemilik adalah seperti yang dipajak, walaupun tidak didaftarkan.

(7) Kerugian yang dialami oleh responden disebabkan oleh pembatalan adalah penyewaan bertempoh. Oleh sebab terdapat ekuiti yang memihak kepada perayu pertama, ia tidak boleh membentuk penyewaan dari sebulan ke sebulan. Mahkamah mempunyai kecenderungan besar untuk menjadikan setiap penyewaan dalam bentuk dari setahun ke setahun. Di mana penyewaan diwujudkan melalui perjanjian langsung, kaedah am dalam common law adalah bahawa notis setengah tahun perlu diberikan yang luput pada akhir tahun penyewaan pertama atau yang lain. Kaedah yang sama terpakai di mana penyewaan dari setahun ke setahun disimpulkan oleh undang-undang daripada bayaran dan penerimaan sewa, atau daripada hal keadaan yang lain. Dengan itu, responden berhak kepada notis enam bulan bagi penamatan penyewaan bertempoh dari setahun ke setahun. Tempoh enam bulan juga adalah masa yang munasabah bagi responden untuk mendapatkan penyewa yang lain. Notis perayu pertama yang secara efektifnya menamatkan kedua-dua perjanjian dan penyewaan bertempoh adalah kurang lima bulan.

(8) Pajakan yang telah diperoleh oleh perayu pertama tidak boleh dikuatkuasakan secara spesifik terhadap perayu pertama bagi sewa bagi tempoh penuh. Responden, oleh itu, hanya berhak kepada ganti rugi sebagai ganti notis penamatan penyewaan bertempoh dari setahun ke setahun.

Case(s) referred to:

Badan Pengurusan Tiara Duta v. Timeout Resources Sdn Bhd [2014] 8 CLJ 133 CA ***(refd)***

Birch v. Wright [1775-1802] All ER Rep 41 ***(refd)***

Chan v. Cresdon Pty Ltd [1989] 168 CLR 242 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Cheong Lep Keen & Anor v. Tan Tin Kek [1966] 1 LNS 32 HC ***(refd)***

A *Copperart Pty Ltd v. Bayside Developments Pty Ltd (1996) 16 WAR 396* ***(refd)***
Frazer v. Walker [1967] 1 AC 569 ***(refd)***
Gates v. City Mutual Life Assurance Society Ltd (1985-1986) 160 CLR 1 ***(refd)***
Haji Taib v. Ismail [1971] 1 LNS 37 HC ***(refd)***
Hughes v. NLS Pty Ltd [1966] WAR 100 ***(refd)***
Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh [1974]
B *1 LNS 51 FC* ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***
Laurinda Pty Ltd v. Capalaba Park Shopping Centre Pty Ltd (1989) 85 ALR 183 ***(refd)***
Lee Ah Low v. Cheong Lep Keen & Anor [1969] 1 LNS 81 FC ***(dist)***
Lee Lum Soh v. Low Ngah [1972] 1 LNS 67 HC ***(refd)***
C *Leitz Leeholme Stud Pty Ltd v. Robinson [1977] 2 NSWLR 544* ***(refd)***
Lian Keow Sdn Bhd (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1986] 1 LNS 78 HC ***(refd)***
Lin Nyuk Chan v. Wong Sz Tsin [1964] 1 LNS 94 FC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
D *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 2 CLJ 713 CA* ***(refd)***
Margaret Chua v. Ho Swee Kiew & Ors [1961] 1 LNS 61 HC ***(dist)***
Mayo v. Joyce [1920] 1 KB 824 ***(refd)***
Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh [1969] 1 LNS 106 HC ***(refd)***
E *Moore v. Dimond [1929] 43 CLR 105* ***(refd)***
Morris v. Robert Jones Investments Ltd [1994] 2 NZLR 275 ***(refd)***
Nangus Pty Ltd v. Charles Donovan Pty Ltd (In Liquidation) [1989] VR 184 ***(refd)***
New Dennis Arther & Anor v. Greesh Ghai Monty & Anor [2012] 3 SLR 908 ***(refd)***
Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok [1976] 1 LNS 87 HC ***(refd)***
Pembinaan Eastern Aluminium Sdn Bhd v. Narita Shipping & Transport Sdn Bhd [2014]
F *5 CLJ 431 CA* ***(refd)***
Pok Kew Chai v. Yeoh Thian Seng & Anor [1974] 1 LNS 114 HC ***(refd)***
Progressive Mailing House Pty Ltd v. Tabali Pty Ltd [1985] 57 ALR 609 ***(refd)***
Re Oliver Brown Pty Ltd (No 2) – BC201210322
Richardson v. Langridge (1811) 4 Taunt 128 ***(refd)***
Saraswathy Ammal & Anor v. Central Bank Of Malaya Ltd [1959] 1 LNS 91 HC ***(refd)***
G *Shevill v. Builders Licensing Board (1982) 149 CLR 620* ***(refd)***
Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***
Sime Hok v. Soh Poh Sheng [2013] 2 CLJ 615 FC ***(refd)***
Sidebotham v. Holland (1895) 1 QB 378 ***(refd)***
Stokes v. Tracey (1) [1920] 2 IR 444 ***(refd)***
H *Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC* ***(refd)***
Tan Khien Toong & Ors v. Hong Bee & Co [1987] 2 CLJ 17; [1987] CLJ (Rep) 353 SC ***(refd)***
Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1992] 1 LNS 7 HC ***(refd)***
United Malayan Banking Corporation Bhd v. Official Receiver And Liquidator Of Soon
I *Hup Seng Sdn Bhd (In Liquidation) & Anor [1985] 1 LNS 162 HC* ***(refd)***
Walsh v. Lonsdale (1882) 21 Ch D 9 CA ***(refd)***
Wood Factory Pty Ltd v. Kiritos Pty Ltd (1985) 2 NSWLR 105 ***(refd)***

Yeap Lean Seng & 4 Ors v. Kok Ho Teik & Anor [1951] 1 LNS 112 HC ***(refd)***
Yeo Chiang Swee v. GF Strickland [1946] 1 LNS 39 ***(refd)***
Yong Tong Hong v. Siew Soon Wah & Ors [1971] 1 LNS 161 FC ***(refd)***
York House Proprietary Ltd v. Federal Commission Of Taxation [1929-1930] 43 CLR 427 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 47
National Land Code, ss. 5, 206(1)(b), (3), 213, 221, 222, 225, 226
Registration of Deeds Ordinance (Cap 118), s. 53(1)
Registration of Deeds Ordinance (Cap 121), s. 5
Specific Relief Act 1950, s. 11(1)(c)

Law of Property Act 1925 [UK], ss. 52, 54

Other source(s) referred to:
Hill and Redman's Guide to Landlord and Tenant Law, 10th edn, pp 14, 16
Judith Sihombing, *National Land Code: A Commentary*, 2nd edn, p 8
Lye Lin Heng, *Landlord and Tenant*, pp 244-245
Samathan Hepburn, *Australian Principles of Property Law*, 2nd edn, p 404
Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 2nd edn, p 232

For the appellants - Porres Royan (Chan Kok Keong & Yap Jyy Huey with him); M/s Shook Lin & Bok
For the respondent - WSW Davidson (Michael Chow, CH Cheong & Goh Chin How with him); M/s Michael Chow

Reported by S Barathi

JUDGMENT

Jeffrey Tan FCJ:

[1] The sole question upon which leave was granted to appeal against the order of the Court of Appeal in respect of the matter decided by the High Court in the exercise of its original jurisdiction reads:

> If a lease or sub-lease (exceeding 3 years) is rendered void by reason of want of registration under the provisions of the National Land Code, does the lease or sub-lease become:
>
> (i) A tenancy at will and if so for what period? or
>
> (ii) An equitable sub-lease and if so, for what period?

[2] By a sub-lease and guarantee agreement (hereinafter referred to as the agreement) dated 1 November 2006, the respondent, as the registered lessee, sub-leased certain floors of a seven storey building known as Wisma Fui Chiu and erected on land held under Geran 42414, Lot 130, Bandar Kuala Lumpur (hereinafter referred to as the demised premises) to the first appellant for a term of 25 years, that is, from 1 May 2006 to 16 October 2031, with the second to fourth appellants in tow as sureties for the first appellant. Clause 6.0(a) of the agreement provided that the respondent shall

execute and deliver to the first appellant "a valid and registrable memorandum of (sub)lease in the prescribed form under the National Land Code ... the quit rent receipt and all other documents including the issue document of title and the consent letter from the chargee or encumbrancer of the lease consenting to the memorandum of (sub)lease, for purposes of effecting the registration of the memorandum of (sub)lease within 14 days from the date of execution of this agreement". Clause 4.2 of the agreement provided that "for the purpose of determining the rent payable the lease period shall be divided into eight consecutive terms of three respectively and one final term ending 16 October 2031". The agreement permitted the first appellant to sublet, underlet or part with possession of the demised premises or any part thereof to third parties.

[3] It was the finding of the Court of Appeal, though not of the High Court who was silent on the same, that the first appellant paid the security deposit of RM2.1m and all rent due until June 2009, that on 14 December 2006, the first appellant transmitted all documents and paid the registration fee to the respondent for the purpose of registration of the sub-lease, that on 20 March 2007, the first appellant reminded the respondent to register the sub-lease, that on 1 August 2007, the respondent forwarded, purportedly, the official receipt for the payment of the registration fee for the sub-lease (on 1 August 2007, the respondent forwarded the receipt of a firm of solicitors – see 348 of the appeal record), that on 6 May 2009, the first appellant discovered that the respondent had not registered the sub-lease, that the non-registration of the sub-lease triggered the tenants of the first appellant, *en masse*, to terminate their respective tenancies with the first appellant, principally on the ground that the first appellant was not the sub-lessee of the demised premises, and that on 13 May 2009, the first appellant served notice of termination of the agreement on the ground of non-registration of the sub-lease (see paras. 5 to 10, and 12 of the judgment of the Court of Appeal).

[4] Shortly thereafter, on 10 June 2009, the appellants filed (the instant) action against the respondent, which sought, *inter alia*, (i) a declaration that the sub-lease was void for non-registration; (ii) a declaration that the termination of the agreement and or of the tenancy at will was valid and binding; (iii) a declaration that the guarantees of the second to fourth appellants were therefore void; and (iv) general and special damages. On 26 June 2009, the respondent responded with a counterclaim, which sought, *inter alia*, (i) a declaration that the termination of the agreement was unlawful and or ineffective to terminate the sub-lease; (ii) a declaration that the sub-lease remained in force; (iii) a declaration that the appellants remained liable to perform the agreement; and (iv) damages to be assessed. In its reply, the appellants pleaded that the sub-lease "was void for non-registration ... and that (the appellants had) lawfully terminated the tenancy at will" (see p. 127 of the appeal record). And by defence to the counterclaim, the appellants pleaded that the failure to register the sub-lease was a fundamental breach.

[5] Meantime, on 8 June 2009, the respondent presented the sub-lease for registration. On 29 September 2009, the respondent applied for summary judgment against the appellants on the counterclaim. On 24 April 2010, the High Court entered summary judgment against the appellants on the counterclaim, and granted the declarations sought by the respondents, namely, (i) that the termination of the sub-lease was unlawful and ineffective; and (ii) that the sub-lease was still valid and binding on the appellants to perform. The High Court ordered damages in favour of the respondent to be assessed. The appellants appealed to the Court of Appeal. The respondent cross-appealed, against that part of the decision of the High Court which held that the sub-lease was void for non-registration (see para. 17 of the judgment of the Court of Appeal).

[6] Indeed, it was held by the High Court that by reason of non-registration "the lease is void and hence a relationship of tenancy at will is created" (see p. 3 of the judgment of the High Court). The High Court did not expand on the "tenancy at will" that it said was created, but reasoned that "there was no fundamental breach ... there was no total failure of consideration" as there was a tenancy at will, and that the termination of the agreement was therefore invalid:

> Despite the lease being void due to non-registration, a tenancy at will had been created.
>
> The basis for the termination is non-registration. There is no fundamental breach as there is no failure of consideration here. Hence the basis of the termination on the grounds of non-registration is unfounded. Therefore the termination is invalid.

[7] In the following paragraphs of its short judgment, the High Court referred to *Lee Ah Low v. Cheong Lep Keen & Anor* [1969] 1 LNS 81; [1970] 1 MLJ 7 and *Lee Lum Soh v. Low Ngah* [1972] 1 LNS 67; [1973] 1 MLJ 97, held that the said tenancy at will was "a tenancy from year to year" (see p. 4 of the judgment of the High Court), and ordered damages in favour of the respondent to be assessed.

[8] At the Court of Appeal, the respondent contended that pending the registration of the sub-lease, an equitable lease was in existence, while the appellants argued that whether it was in existence or not was a triable issue. "The parties did not dispute that there was a tenancy at will", but "the only dispute was whether it was a yearly or monthly tenancy at will" (see para. 21 of the judgment of the Court of Appeal). The Court of Appeal agreed with the High Court that "the sub-lease was void for non-registration" (see para. 23 of the judgment of the Court of Appeal) and that "the tenancy was a yearly tenancy" (see para. 26 of the judgment of the Court of Appeal). Both courts below held that a tenancy at will came into existence when the sub-lease became void for non-registration. But both courts below had different notions of the tenancy at will. On the basis that there was a tenancy

at will, the High Court reasoned that there was no total failure of consideration and that the termination of the agreement was therefore invalid. Whether right or wrong, that opinion of the High Court was at least clear. But with respect, the Court of Appeal was in two minds as to whether it was a "tenancy at will" or "equitable lease". While it held that a tenancy at will was created, it also held that the agreement remained valid in equity as an agreement for lease. *Walsh v. Lonsdale* (1882) 21 Ch Dq CA, *Margaret Chua v. Ho Swee Kiew & Ors* [1961] 1 LNS 61; [1961] 1 MLJ 173, *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 1 LNS 161; [1971] 2 MLJ 105, and *Lin Nyuk Chan v. Wong Sz Tsin* [1964] 1 LNS 94; [1964] MLJ 200 were all held out as authorities that supported the existence of an equitable lease (see para. 23 of the grounds of the Court of Appeal). At the same time, it also held that the notice dated 13 May 2009 was a notice to terminate the agreement but not a notice to terminate a tenancy at will (see para. 24 of the grounds of the Court of Appeal) and that the respondent could not be entirely faulted for the delay in registration of the sub-lease (see para. 27 of the grounds of the Court of Appeal). The Court of Appeal also agreed with the High Court "that it was not the pleaded case of the appellants that the one month notice to terminate was on the basis that the tenancy was a monthly tenancy at will" (see para. 25 of the grounds of the Court of Appeal). For those reasons, it was held by the Court of Appeal that the appellants had not raised any triable issue.

[9] Up to that point of its judgment, it was held by the Court of Appeal that the notice dated 13 May 2009 was ineffective to terminate the tenancy at will which remained in force. But in the ultimate paragraph of its judgment, the Court of Appeal held that "although the sub-lease was void for non-registration, it remained valid in equity as an agreement for a lease":

> It was the respondent's submission before the learned JC that although the sub-lease was void for non-registration, there existed an equitable lease pending its registration. The learned JC however did not address this issue in her grounds of judgment. We have, in the earlier part of our judgment expressed the view that although the sub-lease was void for non-registration, it remained valid in equity as an agreement for a lease. We therefore agree with the submission by learned counsel for the respondent that there existed an equitable lease notwithstanding the non-registration of the sub-lease and accordingly we allow the cross-appeal by the respondent with costs.

[10] The cross-appeal by the respondent was against that part of the decision of the High Court which held that the sub-lease was void for non-registration. In allowing the cross-appeal, it was held by the Court of Appeal that the sub-lease, though void for non-registration, remained valid as an equitable lease. Hitherto, it was held that a tenancy at will was in existence, which begs the question as to whether a tenancy at will could co-exist with an equitable lease, which would be answered later in these grounds.

[11] Section 221 of the National Land Code (NLC) provides: A

(1) Subject to the provisions of ss. 225 and 226, the proprietor of any alienated land may grant leases of the whole or any part thereof in accordance with the following provisions of this section.

(2) Every lease granted pursuant to this section shall be for a term exceeding three years. B

(3) The maximum term for which any lease may be so granted shall be:

(a) 99 years if it relates to the whole of any alienated land; and

(b) 30 years if it relates to a part only thereof. C

(4) Every such lease shall be granted by an instrument in Form 15A; and in any case where the lease relates to a part only of any alienated land, there shall be attached to the instrument a plan and description sufficient to enable the part to be accurately identified.

D

And s. 222 of the NLC provides:

(1) Subject to the provisions of ss. 225 and 226, any lessee or sub-lessee for the time being of any alienated land may grant sub-leases of the whole or any part of the land comprised in his lease or sub-lease in accordance with the following provisions of this section. E

(2) Every sub-lease granted pursuant to this section shall be for a term exceeding three years.

(3) Where any sub-lease so granted relates to a part only of any alienated land, the term thereof shall not exceed 30 years. F

(4) Every such sub-lease shall be granted by an instrument in Form 15B; and in any case where the sub-lease relates to a part only of the land comprised in the grantor's lease or sub-lease, there shall be attached to the instrument a plan and description sufficient to enable the part to be accurately identified. G

[12] A lease or sub-lease is granted by an instrument in Form 15A or Form 15B. In either case, s. 206(1)(b) of the NLC provides that "no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen". "In my opinion, H the language in that provision is sufficiently clear. It means what it says in that the very act of registration once effected necessarily passes the interest so registered. The whole Torrens system of land registration depends on this very principle and any derogation from it would cause the land title to be inconclusive. As Lord Wilberforce puts it: "It would be destructive of the I whole system of land registration" – See *Frazer v. Walker* [1967] 1 AC 569" (*Lian Keow Sdn Bhd (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1986] 1 LNS 78; [1987] 1 MLJ 56 per Yusoff Mohamed J, as

A he then was). A tenancy for a term not exceeding three years is exempt from registration (s. 213 of the NLC). But a lease or sub-lease, which must be for a term exceeding three years, will not pass without registration. Without registration, would any other estate pass?

B **[13]** In *Cheong Lep Keen & Anor v. Tan Tin Kek* [1966] 1 LNS 32; [1968] 2 MLJ 126, the defendant was in occupation of the premises under an agreement with the previous owner which purported to be a lease for 80 years at a rental of $150 per month. The lease was not registered under the Registration of Deeds Ordinance. On the rights acquired by the defendant, Gill J, as he then was, said:

C

> The general rule is that a document purporting to be a lease which is required under a statute to be registered is void as a lease and that from an entry upon a void lease the same result flows as from entry upon an agreement for a lease. Thus in *Doe d Rigge Bell* (1793) 5 TR 471; 101 ER 265, Lord Kenyon C.J. said:
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> > Though the agreement be void by the Statute of Frauds as to the duration of the lease it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, etc. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms ...
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> In *Clayton Blakey* (1798) 101 ER 1234 there was an action against a tenant for double rent, for holding over after the expiration of his term and a regular notice to quit. It appeared in evidence that the defendant had held the premises for two or three years under a parol demise for 21 years from the day mentioned to which the notice to quit referred. The Statute of
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> Frauds directing that any lease for more than 3 years not reduced into writing shall operate only as a tenancy at will, it was contended at the trial that the holding should have been stated according to the legal operation of it as a tenancy at will, and that as there was no count adapted to that statement the plaintiff ought to be non-suited. Rooke J, however, considering that it amounted to a tenancy from year to year, overruled
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> the objection, and the plaintiff obtained a verdict. On a motion to set aside the verdict, on the ground of misdirection, relying upon the positive words of the Statute, Lord Kenyon CJ said:
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> > The direction was right; for such a holding now operates as a tenancy from year to year. The meaning of the statute was that
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> H
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> > such an agreement should not operate as a term; but what was then considered as a tenancy at will, has since been properly construed to ensure as a tenancy from year to year.

[14] Gill J then articulated on the tenancy which may arise by implication of law:

I

> The legal position with regard to a tenancy which may arise by implication of law is summarised by Woodfall on Landlord and Tenant Vol. I (26th edition) at page 296 as follow:

> A tenancy from year to year may also arise by implication of law. Where a person is let into possession under a mere agreement for a future lease, he becomes at common law a tenant at will; but when he pays or expressly agrees to pay any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy. By continuing to hold possession and to pay rent after an assignment of the reversion he becomes at law tenant from year to year under the assignee. The same result flows from entry upon a void lease as from entry upon an agreement for a lease.

At p. 297 it is stated:

> Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressly agrees to pay, any subsequent rent, at the previous yearly rate, a new tenancy from year to year may thereby be created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy.

[15] Gill J then held that the said unregistered lease was void by reason of s. 5 of the Registration of Deeds Ordinance (Cap 121) with the result that the defendant became a tenant at will, and that the tenancy had been effectively put to an end by the notice to quit:

> It is clear from the authorities which I have discussed that in the present case the agreement under which the defendant went into occupation of the premises at No. 33 Newcome Road, Malacca was void as a lease by reason of the provisions of section 5 of the Registration of Deeds Ordinance (S.S. Cap. 121). The result of his entry upon that void lease was the same as would flow from an entry upon an agreement for a lease. Upon his entry the legal relationship of landlord and tenant arose and he became a tenant at will. When he paid the monthly rent reserved under the so-called lease the tenancy at will changed into a tenancy from month to month upon the terms of the intended lease.

[16] In *Lee Ah Low v. Cheong Lep Keen & Anor* [1969] 1 LNS 81; [1970] 1 MLJ 7, which in reality was the appeal against *Cheong Lep Kee & Anor v. Tan Tin Kek*, the Federal Court per Ali FJ affirmed that the result that flows from entry upon a void lease is the same as from an entry upon an agreement for a lease:

> Inasmuch as the written instrument was intended to give a lease of 80 years and inasmuch as it was not made by deed and was not in English language as required by section 53 of the Conveyancing and Law of Property, Ordinance (S.S. Cap. 118), it was rightly held by the learned trial judge that it was void as a lease. Following the principle stated in *Doe d Rigge v. Bell* (1973) 5 TR 471; 101 ER 265 which is also discussed in *Woodfall on Landlord and Tenant*, Vol. 1 (26th Edition) at page 296, [27th Edn, vol 1 p 281] the learned trial judge also held that on the tenant's entry upon such a void lease the same result flows as from an entry upon

an agreement for a lease. On page 3 of *Woodfall on Landlord and Tenant (supra)* the effect of an entry on an agreement or contract for a lease is stated in these words [ibid, p. 3.]:

> ... A contract for a lease is not in itself a demise, but is merely an agreement that the intending lessor shall grant a lease and that the intending lessee shall accept the same. Such a contract does not of itself create a legal relationship of landlord and tenant, but it has long been established that so soon as the tenant enters under the agreement the relationship arises and he becomes a tenant at will, and that when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy. The same rule applies to entry under a void lease.

[17] The Federal Court in *Lee Ah Low* categorically held that the said unregistered lease was void, and that the tenant, on his entry upon such void lease, becomes a tenant at will. But it should be noted that *Lee Ah Low* emanated from the State of Malacca, when the land registration system had yet not been converted from the registration of deeds to the registration of titles under the Torrens system. Under the Conveyancing and Law of Property Ordinance (Cap 118) then applicable to the states of Penang and Malacca, that is prior to the coming into force of the NLC, the execution of a formal conveyance acted to pass the legal estate of the vendor to the purchaser whilst the registration of a dealing acted merely as a public record of the transaction. The Straits Land Act 1839 provided for the registration of transactions (see *Judith Sihombing, National Land Code: A Commentary*, 2nd edn. at p. 8). The Registration of Deeds Ordinance (Cap 121) continued the practice. The NLC and the National Land Code (Penang & Malacca Titles) Act 1963 came into force on 1 January 1966. Until then, "the law of the settlements relating to land is fundamentally English law but modified by the Registration of Deeds Ordinance (Cap. 121 of the revised edition of 1936) which provides that no instrument affecting land shall be admissible in evidence unless registered" (*Yeap Lean Seng & 4 Ors v. Kok Ho Teik & Anor* [1951] 1 LNS 112; [1951] 1 MLJ 235 per Taylor J). Under s. 5 of the Registration of Deeds Ordinance (Cap 121), all deeds affecting land "may be registered ... and unless and until so registered shall be inadmissible in any court as evidence of title to such land". Under s. 53(1) of Cap 118, "a conveyance of any interest in land other than a lease for a period not exceeding three years at a rack rent shall be void at law unless it is by deed in the English language". The unregistered lease in *Lee Ah Low* was not in the English language. Hence, the unregistered lease in *Lee Ah Low* was inadmissible in any court of law as evidence of title (s. 5 of Cap 121) and also void for not being in the English language (s. 53(1) of Cap 118). It was void, but not because of non-registration under Cap 121.

[18] *Margaret Chua v. Ho Swee Kiew & Ors* [1961] 1 LNS 61; [1961] 1 MLJ 173 emanated from the State of Kedah, where the Torrens system was in place. The facts were as follows. On 22 December 1951, the appellant, who was the proprietor of two adjoining vacant shop lots in Alor Setar town, borrowed $30,000 from the respondents, to build two shop houses thereon. The appellant agreed to lease certain portions of the completed buildings to the respondents for a period of 25 years. The appellant also agreed "not to sell or otherwise dispose of the demised premises or any part thereof, without first informing and granting the respondents the option to purchase the same at such price and upon such terms and conditions as shall be mutually agreed on". The agreement which purported to be an actual demise to take effect in future was executed in English, not in Jawi, as required by the Kedah Land Enactment. Thomson CJ (Hill and Good JJA concurred) held:

> The land here was comprised in Surat Putus and by section 53 of the Enactment all such land is subject to the provisions of the Enactment and cannot be leased or otherwise dealt with except in accordance with those provisions. Section 92 provides that any lease for a term exceeding one year must be in the statutory form and must be presented for registration together with the issue document of title. The statutory form is in the Malay language written in the Jawi script and bears no resemblance to the agreement of 22nd December, 1951. The section also provides that no lease of land which has been charged shall, if presented, be registered until the chargee has signified in writing his consent to such a lease.
>
> On this it is clear, and the trial Judge so held, that the agreement of 22nd December, 1951, was clearly incapable of registration as a lease. It was, therefore, incapable of conferring upon the purported lessees any real interest in the land and so as a lease it was a nullity.

[19] Thomson CJ then set out the authorities that supported the view "that although the agreement might be a nullity as a lease it could be, and indeed was, a good enforceable agreement for a lease under which the appellant as registered proprietor had undertaken the obligation to grant a lease":

> For that view there is considerable authority.
>
> In the case of *Parker v. Taswell* 2 De G & J 559 an instrument which as containing words of present demise was a lease but which not being under seal was void as such by reason of section 3 of the Real Property Act, 1845, (8 & 9 Vict. c. 106) was treated as an agreement for a lease and specific performance was granted. Lord Chelmsford said (at p. 570):
>
> > If the Legislature had intended to deprive such a document of all efficacies, it would have said that the instrument should be 'void to all intents and purposes.' There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect.

In the case of *Tidey v. Mollett* (1864) 16 CB (NS) 298, 308 Erle CJ referring to leases not under seal, said:

> Although at one period the Courts strove to construe these documents to be present demises, yet, since the 8 & 9 Vict. c. 106, for the same reason, the Judges will, if they contain words of agreement, construe them to be agreements only, and not demises-*ut res magis valeat quam pereat*.

Again, in the case of *Martin v. Smith* LR 9 Ex 50 52 the Court was concerned with an instrument not under seal and Kelly C.B. said:

> *Parker v. Taswell* has decided that such an agreement, though void as a lease, is good and valid as an agreement, and may be enforced in equity by a decree for specific performance.

Later, in the case of *Zimbler v. Abrahams* [1903] 1 KB 577, Stirling LJ said (at p. 582):

> Having regard, however, to the decision of Lord Chelmsford in *Parker v. Taswell*, we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance.

Finally, in the case of *In Re Fireproof Doors Ltd Umney v. The Company* [1916] 2 Ch 142 151 Astbury J applied the same principle to debentures that were invalid as such as not being under seal. He said:

> A lease void at law under the Real Property Act, 1845, s.3, may be used as an agreement: *Parker v. Taswell*; and I see no reason why an irregular debenture should not be treated in the same way.

Apart from English authority it has been made clear more than once in jurisdictions where the law provides for registration of title to land that the law relating to transfer of land is distinct from the general law of contract.

In the Johor case of *Alagappa Cherty v. Ng Guan Yin* 5 FMSLR 236 Brown J said with reference to an agreement for the sale of land which could not be registered (at p. 241):

> The correct view of the effect of such a transaction in the Federated Malay States (and therefore in Johor) appears to be that, not being recognised by the law relating to registration of title, it can operate as a contract and may therefore give rise in appropriate circumstances to a decree for specific performance against the proprietor of the land but cannot create anything in the nature of an encumbrance on the land itself.

In the New South Wales case of *Josephson v. Mason* (1912) 12 SR (NSW) 249 (FC), where the facts were not dissimilar to those of the present case except that the plaintiff in that case was the landlord and he was suing for ejectment, it was said by Cullen CJ:

> It was not disputed, and at this day it clearly could not be, that a contract for the granting of a lease would be binding upon the registered proprietor who made it, and that the Act would not stand in the way of a full recognition of such a contract, and the usual equitable incidents attached to it.

Again in the Perak case of *Bachan Singh v. Mahinder Kaur* [1956] MLJ 97 I myself made the following observations from which, on reflection, I see no reason to depart:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code.

> That was a case where it was said that a registrable transfer in the statutory form must be treated as *prima facie* evidence of an antecedent oral contract to sell the land. In the present case, there is no question of a registrable instrument in the statutory form and of course there is no question of an oral contract. There is, however, a written contract and in my view it is a binding contract. It is a contract with which the appellant has failed to comply and of which she is clearly in breach. In the circumstances, in my view, the respondents are entitled to their remedy.

[20] In *Margaret Chua*, the lease was incapable of registration as a lease. "It was, therefore, incapable of conferring upon the purported lessees any real interest in the land and so as a lease it was a nullity" (*Margaret Chua* per Thomson CJ). It was a nullity for being in the wrong language. In fact, both leases in *Lee Ah Low* and *Margaret Chua* were nullities for being in the wrong language. But with respect, that distinction was not appreciated in the following cases that cited and or purportedly followed *Lee Ah Low* and/or *Margaret Chua*. To begin with, it was misread in *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 1 LNS 161; [1971] 2 MLJ 105 that it was held in *Lee Ah Low* that the lease was void for non-registration:

> Every case must, of course, be decided according to its peculiar facts. The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds. An example is *Lee Ah Low v. Cheong Lip Kien* [1970] 1 MLJ 7, a recent decision of this court ... No equity had been created in his favour, as in *Inwards v. Baker* [1965] 2 WLR 212 213, by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearly or monthly tenancy by reason of the lease being

> void for non-registration. That case was not as fully argued as it might have been, nor were the cases cited which have been brought now to our attention and carefully distinguished. The *ratio decidendi*, therefore, should not, in my view, be regarded as a binding precedent for all cases where premises are let for a term of years at a monthly rent under a lease void for non-registration.

[21] In *Lee Lum Soh v. Low Ngah* [1972] 1 LNS 67; [1973] 1 MLJ 97, it was held, "having regard to the provisions of s. 221 and to the definition of "lease" under s. 5 of the National Land Code and the principle enunciated in the case of *Lee Ah Low*", that the unregistered lease was "void as a lease for non-registration".

[22] And in *Tan Khien Toong & Ors v. Hong Bee & Co* [1987] 2 CLJ 17; [1987] CLJ (Rep) 353; [1987] 1 MLJ 387, the tenants were let into possession of the whole of the ground floor of 171-D, Jalan Rahang, Seremban, at the monthly rental of $170 as from 1 April 1962 under an agreement which provided that "so long as the tenants shall pay the monthly rental of the demised premises punctually and promptly on the first day for every month and in any event not later than the fourteenth day of any month, and strictly adhere and abide by the terms and conditions contained herein, the tenants shall enjoy uninterrupted occupation of the demised premises, and the landlord shall not hinder, obstruct or determine the tenants' right to such enjoyment under any circumstances". After the death of the landlord, one Tan Kwan, the appellants became the registered co-owners of the shop premises and accepted the rent tendered by the respondents. As a result, the legal relationship of landlord and tenant was created between the parties. It was conceded that the written agreement of 31 March 1962 was never registered at the land registry office. The appellants claimed that the respondents were monthly tenants whose tenancy had been terminated. The crux of the defence of the respondents was that they, by reason of them having paid $9,000 as premium to the late Tan Kwan, were given a tenancy in terms of cl. 7 and that they were induced by the late Tan Kwan to pay the money over in the expectation of being allowed to stay there indefinitely for so long as they paid the rental regularly. The High Court gave judgment in favour of the respondents. The question raised in the appeal was whether the High Court was right to apply the principle of equitable estoppel to the facts of the case, and whether the agreement was enforceable in equity.

[23] Seah SCJ held that the lease was void on the ground of non-registration:

> It was common ground that the agreement in writing dated March 31, 1962 was void as a lease on the ground of non-registration. Applying the principle propounded in *Lee Ah Low* case to the facts herein, we are of the opinion that since the respondents had entered into possession under a void lease without any objection from the late Tan Kwan, the legal relationship of landlord and tenant arose and the respondents became

> tenants at will. When the respondents tendered and paid the rent monthly which was accepted by the landlord, the tenancy at will was converted into a tenancy from month to month. It was subject to this monthly tenancy that the shop premises must be deemed to have been transmitted to the appellants, so that the respondents became a monthly tenant of the appellants. This monthly tenancy, in my judgment, had been duly determined by the notice to quit ... As the plea of equitable estoppel also failed, I would allow the appeal, set aside the judgments of the courts below and enter judgment in favour of the appellants.

[24] Hashim Yeop A Sani SCJ, as he then was, held that what became evident from the undisputed facts, when the respondents failed to show that an equity had been created in their favour, was a monthly tenancy terminable with one month's notice.

> In a case of this nature, I would endorse fully what Ong CJ said in the Federal Court in *Siew Soon Wah* [1973] 1 MLJ 133 PC at page 107 [1971] 2 MLJ 105 FC:
>
> > Every case must, of course, be decided according to its peculiar facts. The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds. An example is *Lee Ah Low v. Cheong Lip Kien* ([1970] 1 MLJ 7) a recent decision of this court ... No equity had been created in his favour, as in *Inwards v. Baker* ([1965] 2 WLR 212 213) by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearly or monthly tenancy by reason of the lease being void for non-registration.
>
> The conclusion is therefore very simple. Since the respondents here had failed to show that an equity had been created in their favour what becomes evident from the undisputed facts is a monthly tenancy terminable with one month's notice.

[25] Cases which (mis)read *Margaret Chua* as to have held that an unregistered lease is void for non-registration were *Pok Kew Chai v. Yeoh Thian Seng & Anor* [1974] 1 LNS 114; [1975] 1 MLJ 220, where it was remarked that the agreement in *Margaret Chua* "was void as a lease for lack of registration, it was valid as an agreement for a lease enforceable in equity", *Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok* [1976] 1 LNS 87; [1977] 1 MLJ 124, where it was held, purportedly on the authority of *Margaret Chua*, that the unregistered lease was void for non-registration, *Pembinaan Eastern Aluminium Sdn Bhd v. Narita Shipping & Transport Sdn Bhd* [2014] 5 CLJ 431; [2014] 4 MLJ 534, where it was held that *Margaret Chua* was amongst a long line of authorities that established "that although a lease is void for non-registration under the NLC and that an agreement might be a nullity as a lease, an agreement could be a good and valid enforceable agreement to grant a lease", and *Badan Pengurusan Tiara Duta v. Timeout Resources Sdn Bhd* [2014] 8 CLJ 133; [2015] 1 MLJ 110, where it was held,

A once more on the purported authority of *Margaret Chua*, that an unregistered lease "although void as a lease and will not have the effect of vesting an interest in the lessee, is still good and valid as an agreement for a lease and is enforceable in equity by a decree of specific performance".

B **[26]** Practically all aforesaid cases also overlooked that the Statute of Frauds 1677 required every lease (exceeding three years) to be in writing. "In default of this, only a tenancy at will was created" (*Megarry & Wade, The Law of Real Property,* 8th edn. at paras. 17-036). "The Real Property Act 1845 required a deed in which the existing law required writing. The exception as to leases for three years or less therefore remains as before but all other C leases had to be by deed. The Act provided that "a lease required by law to be in writing ... shall be void at law unless also made by deed" "(*Megarry & Wade, supra* at paras. 17-037). Those provisions continue to stand side by side in ss. 52 and 54 of the Law of Property Act of 1925 (*Megarry & Wade, supra* at paras. 17-038). Under English provisions, a lease which does not D meet legal formalities is void.

[27] But the NLC does not say that an unregistered lease is void for non-registration. "In fact, it even provides for the recognition of the operation of contractual transactions in so far as land dealings are concerned" (*Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood and Khaw E Lake Tee, 2nd edn. at p. 232). Section 206(1)(b) of the NLC provides that "no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen". But s. 206(3) of the NLC provides that "nothing in sub-s. (1) shall affect the F contractual operation of any transaction relating to alienated land or any interest therein".

[28] Evidently, while s. 206(1)(b) of the NLC provides for the right *ad rem*, s. 206(3) provides for the right *in personam*. The NLC recognises the distinction. "That the Code itself recognises such rights finds expression in G s. 206(3). See also *Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196" (*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 CLJ 713; [1995] 1 MLJ 719 per Gopal Sri Ram JCA, as he then was). In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 7, the Federal Court H per Gopal Sri Ram JCA, as he then was, especially quoted the following passage from the judgment of Raja Azlan Shah J, as HRH then was, in *Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196:

> I Digressing for a moment, it is to be emphasised that here, as in other areas of our land law, it is important to distinguish between rights *ad rem* and rights *in personam*. That the Code expressly preserves this distinction was recognised by so learned a judge as Raja Azlan Shah J (as he then was) in *Mercantile Bank Ltd v. The Official Assignee of the property of How Han Tek* [1969] 2 MLJ 196 at p 198:

> The Official Assignee's view is not correct, *Vallipuram*'s case (*Vallipuram Sivaguru v. Palaniappa Chetty* [1937] MLJ 59) is against him. He forgets that independent of our land legislation our courts have always recognised equitable and contractual interests in land. See *Loke Yew v. Port Swettenham Rubber Co* [1913] AC 491. See also s. 206(3) of the National Land Code.

[29] "In our view, s. 206(3) of the Code contains an express provision which states that the provisions of the Code requiring a dealing to be effected in the statutorily prescribed manner shall not "... affect the contractual operation of any transaction relating to alienated land or any interest therein". This provides statutory authority for the liberal application of equity whenever there is a basis for that (see, eg *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 1 LNS 161; [1971] 2 MLJ 105; *Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196; *Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh* [1974] 1 LNS 51; [1974] 1 MLJ 145; *Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1992] 1 LNS 7; [1993] 1 MLJ 443 at p. 459 and *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19; [1993] 3 MLJ 353 at p. 405). However, it is a condition precedent for the application of s. 206(3) that there is in existence a transaction relating to alienated land or an interest therein which is valid and enforceable as a contract" (*Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805 per Edgar Joseph Jr FCJ, delivering the judgment of the court). "... s. 206(3) of the Code which expressly reserves the contractual operation of any transaction relating to alienated land" (*United Malayan Banking Corporation Bhd v. Official Receiver And Liquidator Of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor* [1985] 1 LNS 162; [1986] 1 MLJ 75 per Shankar J, as he then was). "... non-registration under s. 206(1)(b) does not affect any contractual operation of any transaction relating to alienated land or any interest therein" (*Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541; [1997] 2 MLJ 221 per Peh Swee Chin FCJ, delivering the judgment of the court). Consequently, "although the agreement was not a proper instrument for registration as a lease the authorities are clear that it may be treated as an agreement for a lease. The validity of contracts relating to alienated land or any interest therein is explicitly declared in s. 206(3) of the National Land Code" (*Yong Tong Heng v. Siew Soon Wah & Ors* [1971] 1 LNS 161; [1971] 2 MLJ 105 per Ong CJ (Malaya), delivering the judgment of the court). An unregistered lease is certainly not void (see *York House Proprietary Ltd v. Federal Commission of Taxation* [1929-1930] 43 CLR 427, 435).

[30] Clearly, all contractual obligations remained unaffected by non-registration of the sub-lease. In the instant case, when the first appellant served notice of termination, already two and a half years had passed since execution of the agreement. But the sub-lease was still unregistered. When the appellants served notice of termination, the sub-lease had not even been presented for registration. It was subsequently presented for registration on

8 June 2009, that is, after the notice of termination. But as the presentation and registration of the sub-lease only transpired after the first appellant had served notice of termination, they could not count against the appellants. Rather, the validity of the notice should be judged on the facts as known on 13 May 2009. First, it should be noted that the first appellant had possession of the demised premises even well before execution of the agreement (see cl. 4.5 of the agreement). The previous contractual arrangement was not disclosed. But with execution of the agreement, on 1 May 2006, the first appellant became, ostensibly, a sub-lessee with security of tenure of 25 years. The agreement provided for registration of the sub-lease. Pending registration of the sub-lease, the first appellant had an agreement for a lease. It would even have been generally assumed that the registration of the sub-lease was but a matter of course. But the sub-lease was not registered, not even after two and a half years had passed. On 13 May 2009, all that the first appellant had was an agreement for a lease and without any indication that the sub-lease would be registered. It was in those circumstances that the first appellant served notice of termination.

[31] It was submitted that the time for registration of the sub-lease was not specified in the agreement. Section 47 of the Contracts Act 1950 provides that "where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time" and that "what is a reasonable time is, in each particular case, a question of fact". Clause 6.0(a) of the agreement provided that the memorandum of sub-lease together with all other documents necessary to effectuate the registration of the sub-lease shall be executed and delivered "within 14 days from the execution of this agreement". On 14 December 2006, the first appellant paid the registration fee. Given so, it should seem that the registration of sub-lease would have been urgent business to be completed as soon as possible. But it would not appear that any urgency was put to it. On 20 March 2007, the first appellant reminded the respondent to register the sub-lease. Months later, the respondent responded by forwarding the receipt issued by a firm of solicitors. It was contended that the chargee's consent for the sub-lease contributed to the overall delay. That might be so. But that could not reasonably explain away the overall delay that extended into years. Reasonably, on 13 May 2009, it would only appear that the registration of the sub-lease had not been performed within reasonable time, which was a breach which occurred without any notice from the first appellant fixing a reasonable time for performance (see *Sime Hok v. Soh Poh Sheng* [2013] 2 CLJ 615; [2013] 2 MLJ 149). On the ground of non-registration of the sub-lease, the first appellant served notice of termination to take effect on 1 July 2009. But was the first appellant entitled to terminate the agreement? The following decisions of the High Court of Australia are most instructive.

[32] In *Progressive Mailing House Pty Ltd v. Tabali Pty Ltd* [1985] 57 ALR 609, the lessor, Tabali Pty Ltd, entered into a lease with the lessee, Progressive Mailing House Proprietary Limited, but the lease was not registered. The lessee entered into possession, but did not pay rent for the first two months and from May 1979 to October 1979, due to a dispute between the parties as to the completion of certain work to be carried out by the lessor. The lessor commenced proceedings against the lessee. The statement of claim accepted the lessee's repudiation and sought damages accordingly. Both parties agreed that the matter could be considered on the basis that the memorandum of lease was so registered. Lusher J held that the lessee was in breach of the covenants to pay rent and to maintain and repair and that the breaches had not been rectified. Lusher J, followed the majority decision of the Court of Appeal in *Shevill v. Builders Licensing Board,* a decision which was later reversed (see (1982) 149 CLR 620; 42 ALR 305), and concluded that, although a lessor could not recover rent after forfeiture, he could recover damages for loss of the benefit of the covenant to pay rent. On the assumption that a period of six months approximately would elapse before the lessor would succeed in re-letting the premises, the lessee was ordered to pay the sum of $85,000 by way of damages in respect of the loss, as a consequence of re-entry, of the benefit of covenants contained in the memorandum of lease. An appeal from that decision, limited to the question whether Lusher J was correct in awarding damages, was dismissed by the Court of Appeal. The sole question before the High Court was again whether Lusher J was correct in awarding damages.

[33] Mason J, as he then was, held that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases, "thereby rejecting the traditional common law position that lease contracts are in a different category to other types of contracts" (*Australian Principles of Property Law* by Samathan Hepburn 2nd edn. at p. 404):

> In Equity, however, a written lease not under seal was regarded as evidencing an agreement for lease. As an agreement for lease was capable of specific performance Equity would decree specific performance of the written lease by ordering the execution of a lease under seal. In the meantime, in accordance with the doctrine of *Walsh v. Lonsdale* (1882) 21 Ch D 9, the relationship between the parties in Equity was that of landlord and tenant (*Carberry v. Gardiner*, *supr*a, at p 569). The landlord could, if necessary, be restrained by injunction from acting on the footing that the other party was merely a tenant at will or a tenant from year to year (*Walsh v. Lonsdale* (1882) 21 Ch D 9; *Dockrill v. Cavanagh* (1944) 45 SR (NSW) 78 at 83). It was otherwise where the agreement had been terminated. Then Equity would not allow one party to allege that any tenancy, even a tenancy at common law, existed (*Dimond v. Moore* (1931) 45 CLR 159).
>
> ...

A ... notwithstanding the failure to register the memorandum of lease, it brought into existence an equitable term of the duration which it specified and subject to the conditions which it contained. The question which arises is the extent, if at all, to which the relevant rights, duties and liabilities of the parties to the memorandum of lease fall to be determined by reference to the ordinary principles of contract law.

B In *Shevill,* Gibbs CJ (149 CLR at p 625) assumed, without deciding, that the ordinary principles of contract law, so far as they are relevant to the questions that arose in that case, applied to leases. He acknowledged that a contrary view had been expressed in *Total Oil v. Thompson Garages* [1972] 1 QB 318, where the English Court of Appeal held that the principle that C acceptance of a repudiation brings a contract to an end had no application to a lease because the lease was more than a contract - it created an estate or interest in land ... Lord Denning MR (with whom Edmund Davies and Stephenson L JJ agreed) placed some reliance (at p 324) on the opinion expressed by Lord Russell of Killowen and Lord Goddard in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC D 221 at 234 and 244, that frustration does not bring a lease to an end. However, recently in *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675, the House of Lords held that the doctrine of frustration was in principle applicable to leases. Lord Wilberforce and Lord Simon of Glaisdale pointed out (at pp 695-6 and 702-3) that both in the United States and in Canada it had been accepted that a lease might be E terminated by frustration - see Williston on *Contracts* vol 18 (3rd ed, 1978) §.1955; *Corbin on Contracts* (1962) §.1356; *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710 at 721. Their Lordships quoted the following passage from the judgment of Laskin J in the last-mentioned decision (at p 721): 'It is no longer sensible of pretend that a commercial lease, such as the one before this court, is simply a conveyance F and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land'.

G ...

Accordingly, the balance of authority here as well as overseas, and the reasons on which it is based, support the proposition that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases.

H **[34]** Mason J enunciated that mere breaches of covenant on the part of the lessee do not amount to a repudiation or fundamental breach and that it is essential to an award of damages for loss of bargain that the defendant can no longer be required to perform his contractual obligations *in specie*.

I It is often said that repudiation or fundamental breach - in the sense of breach of a condition or breach of another term or terms which is so serious that it goes to the root of the contract, and thus deprives the other party of substantially the whole benefit of the contract (*Federal Commerce & Navigation Co Ltd v Molena* [1979] AC 757 at 779) - entitles the innocent party to rescind the contract and sue for damages for loss of the bargain

(see, for example, *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 458; 9 ALR 309 at 319-20). But this does not mean that such damages are recoverable only in the event of discharge for breach though it is essential to an award of damages for loss of bargain that the defendant can no longer be required to perform his contractual obligations *in specie*.

...

What needs to be established in order to constitute a repudiation is that the party evinces an intention no longer to be bound by the contract or that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way (*Shevill*, at 57 ALR 609 at 621 pp 625-7). Likewise, the primary judge's finding does not amount to a finding that there was a fundamental breach of contract in the sense that the party at fault, though wishing to perform the contract, was guilty of such default in performance that the breach went so much to the root of the contract that it made commercial performance of it impossible ...

Repudiation or fundamental breach of a lease involves considerations which are not present in the case of an ordinary contract. First, the lease vests an estate or interest in land in the lessee and a complex relationship between the parties centres upon that interest in property. Secondly, this relationship has been shaped historically in very large measure by the law of property, though in recent times the relationship has been refined and developed by means of contractual arrangements. Thus, traditionally at common law a breach of a covenant by a lessee, even breach of the covenant to pay rent, conferred no right on the lessor to re-enter unless the lease reserved a right of re-entry (*Lane v Dixon* (1847) 3 CB 776 ; [136 ER 311]; *Doe d Dixon v Roe* (1849) 7 CB 134 ; [137 ER 55]). And in Equity the proviso for re-entry was treated as a security for the payment of the rent (*Howard v Fanshawe* [1895] 2 Ch 581 at 588; *Ezekiel v Orakpo* [1977] QB 260 at 268 [1977] QB 260-9), so that on payment of the rent Equity would relieve against the forfeiture (*Dendy v Evans* [1910] 1 KB 263). The object and effect of s 129 of the Conveyancing Act was to give further protection to the lessee and to preclude forfeiture of his interest in property within the sphere of the section's operation, except in accordance with its terms.

These incidents of the law of landlord and tenant indicate that mere breaches of covenant on the part of the lessee do not amount to a repudiation or fundamental breach. Indeed, it is of some significance that the instances in which courts have held that a lessee has repudiated his lease are cases in which the lessee has abandoned possession of the leased property.

[35] Brennan J also enunciated on early determination, repudiation and said that a lessor can recover damages for loss of the benefit of a lease only where the lessee has repudiated the lease before determination of the term, and that the condition on which the lessee's liability in damages for repudiation arises is that he ceases to be liable to perform the executory obligations resting on him under the lease.

When a lease is determined prior to the expiry of the term, the covenant to pay rent for the unexpired portion of the term ceases to bind the lessee. Once the lease is determined, the lessee commits no breach of covenant by reason of his non-payment of rent for that unexpired portion: *Jones v. Carter* (1846) 15 M & W 718 at 726; [153 ER 1040 at 1043]. A lessor who, under a proviso for re-entry, serves the lessee with process for recovery of possession is entitled to mesne profits for the period during which the lessee remains in possession after service (*Canas Property Co Ltd v. K L Television Services Ltd* [1970] 2 QB 433). The lessor may thereby recover an amount equal to the rent in respect of that period. But mesne profits are damages for trespass; mesne profits are not rent, nor are they damages for breach of a covenant to pay rent.

A lessor can recover damages for loss of the benefit of a lease only where the lessee has repudiated the lease before determination of the term. Such a repudiation is not necessarily established by proving a default in the payment of rent. In *Shevill v. Builders Licensing Board* (1982) 149 CLR 620 at 627; 42 ALR 305 at 309, Gibbs CJ said with the concurrence of Murphy J and me:

> It is clear that a covenant to pay rent in advance at specified times would not, without more, be a fundamental or essential term having the effect that any failure, however slight, to make payment at the specified times would entitle the lessor to terminate the lease.

The Chief Justice stated the general principles governing the rescission of contract for anticipatory breach (CLR at pp 625-6; ALR at 308). Repudiation by anticipatory breach occurs: '... if one party renounces his liabilities under it - if he evinces an intention no longer to be bound by the contract (*Freeth v Burr* (1874) LR 9 CP 208 at 213) or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way (*Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 72; *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327 at 351). In such a case the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages: *Heyman v Darwins Ltd* [1942] AC 356 at 399. It is convenient to say that the injured party in these circumstances rescinds the contract, although there is, of course, *no rescission ab initio*: *Johnson v Agnew* [1980] AC 367 at 392-3.

...

A promisor cannot, by repudiating his obligations, unilaterally alter the legal relationships between himself and the promisee. Until the promisee accepts the repudiation, the rights and obligations arising from the partial execution of the contract and causes of action that accrue from its breach continue unaffected (*McDonald v. Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477). The promisee's acceptance of the repudiation is an essential element in the cause of action for damages for anticipatory breach. That is because the liability in damages is substituted for the executory obligations to which acceptance of repudiation puts an end. Lord Diplock explained in *Lep Air Services v Rolloswin Ltd* [1973] AC 331 at 350:

> Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the rescission. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces ...
>
> ...
>
> Where the lease is liable to forfeiture, as it was in the present case, enforcing the forfeiture both determines the lessee's interest in the land and constitutes the lessor's election to accept the repudiation. Conversely, a waiver of the forfeiture constitutes the lessor's election to keep the lease on foot. It is not necessary to consider the possible effects of statutory restrictions on the enforcing of a forfeiture or of the granting of relief against forfeiture, except to bear in mind that the condition on which the lessee's liability in damages for repudiation arises is that he ceases to be liable to perform the executory obligations resting on him under the lease.

[36] In *Laurinda Pty Ltd v. Capalaba Park Shopping Centre Pty Ltd* (1989) 85 ALR 183, the lessor, Capalaba was obliged to fill in certain details left blank in the memorandum of lease. This was never properly done by Capalaba, and the lease remained in an unregistrable form. Over a period of almost nine months since entering into possession, Laurinda made requests for the formalities to be complied with. Eventually, a letter demanding the receipt of a copy of the executed lease within 13 days was sent by Laurinda to Capalaba. Capalaba's solicitors gave a totally unresponsive reply and Laurinda purported to rescind the agreement for lease on the ground that Capalaba had repudiated the agreement or was in breach of essential conditions of that agreement as a result of Capalaba's failure to register the lease or to deliver a lease in registrable form. Capalaba treated Laurinda's rescission as wrongful repudiation of the agreement. On 3 October 1986, Capalaba re-entered the premises, Laurinda having ceased to pay rent in respect of the premises. On 31 October 1986, Laurinda commenced an action, *inter alia*, for a declaration that the lease had been validly determined on or about 5 September 1986, and for an order for the return of the sum of $2317, damages and interest. Laurinda claimed that it was a term that the lessor would grant and complete the lease by the date on which Laurinda opened Shop 79 for business and that Capalaba failed to comply with this

A term, that it was a term that the lessor would expeditiously procure the registration of the lease or, alternatively, procure registration of it within a reasonable time, and that the lessor had failed to comply with this term. By its defence, Capalaba disputed that the terms alleged by Laurinda were terms of the deed or of any agreement and Capalaba denied that it was guilty of any B unreasonable delay in completing the transaction. Capalaba contended that Laurinda's rescission was no more than wrongful repudiation, that Laurinda owed $3318.22 by way of unpaid rent from 1 September 1986, that this amount had not been paid.

[37] Connolly J found an express as well as an implied obligation to bring C into existence a lease in registrable form within a reasonable time which had expired long before September 1986. Connolly J considered that the lessor's non-performance in this situation amounted to repudiation entitling the lessee to terminate the agreement. On appeal, Matthews, Carter and Dowsett JJ came to the conclusion that because the term on which the decision D depended was a promissory condition, the lessees, as the parties requiring performance, were bound, in the circumstances of the case, to give an effective notice stating that in the event that the delay continued they would no longer be bound by the agreement, and that the letter of 21 August 1986 was not such a notice. In the result, the appeal was allowed, the declaration E and orders made at the trial court were set aside and judgment was entered for such sums as might be assessed by the Master. At the High Court, it was common ground that the lessor was required to register the lease or, if not, to deliver a registrable lease to the lessee.

[38] Mason CJ said that delay on the part of Capalaba in performing a F non-essential contractual obligation could not justify a refusal by Laurinda to perform its obligations:

> Mere delay on the part of Capalaba in performing a non-essential contractual obligation cannot justify a refusal by Laurinda to perform its obligations. Something more - whether it be conduct amounting to a clear G repudiation by Capalaba of the requirement to complete or failure to comply with a valid notice given by Laurinda fixing a time for completion and making time of the essence in that respect - would be required.
>
> This conclusion disposes of any suggestion that Capalaba's failure to register the lease or to deliver a registrable lease was a breach of an essential condition of the agreement constituted by the deed. The deed H did not make time of the essence in any relevant respect. Nor did the deed fix a time within which registration or delivery of the lease was to take place. On the contrary, as I have explained, the deed contemplated that Laurinda's obligations would continue to subsist despite any delay in completion of the lease.

I **[39]** Mason CJ held that there was repudiation by Capalaba and Laurinda was entitled to give notice to Capalaba to complete the registration of the lease:

> Based on Capalaba's unwillingness to deliver a registrable lease to Laurinda, it seems to me that Capalaba's intention was only to perform the contract in a manner substantially inconsistent with its obligations, such as would allow Laurinda to treat Capalaba as having repudiated the contract.
>
> The Full Court appears to have reached the opposite conclusion on the footing that the case against Capalaba amounted to no more than a case of delay and that mere delay is never a sufficient foundation for inferring an intention to repudiate. Whether the statement that mere delay can never support an inference of intention to repudiate can be sustained as a universal proposition may be put to one side because cl 15.7 specifically deals with the situation in this case. However, the short answer to the approach taken by the Full Court is that the circumstances, as I have outlined, amount to more than a case of mere delay. Capalaba's delay was accompanied, as Connolly J found, by an intention not to complete the contract until it suited it.
>
> ... Capalaba does not now dispute that there had been unreasonable or unnecessary delay on its part in completing the agreement before 21 August 1986 such as would entitle Laurinda to give notice to complete, fixing a reasonable time within which completion was to take place: see *Louinder v. Leis* (1982) 149 CLR 509; 41 ALR 187; *Green v. Sevin* (1879) 13 Ch D 589; *Smith v. Hamilton* [1951] Ch 174 ...

[40] Brennan J also expounded on the right to rescind and the significance of a notice, as follows:

> A right in one party to rescind a contract will arise when the other party repudiates a contract generally, but it may also arise when the other party repudiates a term of the contract. A right to rescind depends on the importance of the term repudiated. Here, the subject of the agreement was the granting of a legal lease for a term of six years. The implied promise by Capalaba to procure registration of an appropriate instrument was thus at the heart of the agreement. It was a promise of such importance to the promisee that it would not have entered into the contract unless it had been assured of substantial performance and this ought to have been apparent to the promisor. It answered the criterion of an essential promise in the sense that an outright repudiation of the promise would have entitled Laurinda to rescind. The criterion of an essential promise which I have stated in terms relevant to the present case is derived from the criterion expressed by Jordan CJ in *Tramways Advertising Pty Ltd v. Luna Park* (NSW) Ltd (1938) 38 SR(NSW) 632 (at 641-2) and frequently adopted in this court, most recently in *Ankar Pty Ltd v. National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 556; 70 ALR 641, but I have modified it by using the term "substantial performance" rather than the usual formula of "a strict or a substantial performance". The modification is necessary when, no day for performance being stipulated and the subject matter of the promise not being such as to require strictly timeous performance, time is not of the essence of the promise either in law or in equity: *Canning v. Temby* (1905) 3 CLR 419 at 425; *Louinder v. Leis* (CLR at 533). When time is not of the

essence, the promisee must have been willing to enter into the contract without an assurance that the promise would be performed strictly, *albeit* with an assurance that the promise would be performed substantially. Thus, Laurinda would not have been entitled either at law or in equity to rescind the contract as soon as a reasonable time for procuring registration had elapsed. As Griffith CJ said in *Canning v. Temby*, at 426:

> In one sense, of course, time is always of the essence of a contract to be performed within a reasonable time. But that is not the sense in which the term 'of the essence' is used.

Where an essential term - in the sense defined - is to be performed within a reasonable time, there being no stipulated day for performance, and that time passes without performance, the innocent party does not acquire a right to rescind unless the defaulting party repudiates or has repudiated his obligation to perform. Barwick CJ and Jacobs J observed in *Neeta (Epping) Pty Ltd v. Phillips* (1974) 131 CLR 286 at 306; 3 ALR 151 at 167:

> Contracts for the sale of land, creating as they do equitable interests in the land, do not easily go off except pursuant to an express condition of the contract or pursuant to an express repudiation or a repudiation clearly to be inferred.

The same observation may be applied to agreements for lease. More than a mere failure in timeous performance is necessary to warrant an inference of repudiation, but delay may be so serious as to amount to a refusal to perform and in such a case an innocent party has a right to rescind: see *De Soysa v. De Pless Pol* [1912] AC 194 at 202-3; *Holland v. Wiltshire* (1954) 90 CLR 409 at 420.

The difference between a contract which contains a stipulated day for performance of an essential term and a contract which, expressly or impliedly, requires performance within a reasonable time is important when the question is whether, on failure to perform within the time limited by the contract, the innocent party is entitled to rescind. In the former case, a right to rescind arises at law when the stipulated day passes; in the latter, that right does not necessarily arise when the reasonable time expires but only when repudiation is clearly to be inferred from the circumstances in which the delay occurs. Delay will amount to repudiation if the defaulting party "evinces an intention no longer to be bound by the contract … or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way": *Shevill v. Builders Licensing Board* (1982) 149 CLR 620 at 625-6; 42 ALR 305 *Progressive Mailing House Pty Ltd v. Tabali Pty Ltd* (1985) 157 CLR 17 at 33, 40; 57 ALR 609.

...

When delay in performance is prolonged, the point at which repudiation might be inferred is necessarily uncertain. The promisor and promisee are likely to regard the circumstances differently. To provide a firm foundation for the inference of repudiation, it is prudent for the promisee to give a notice to complete. In *Louinder v. Leis*, Mason J said (CLR at 526; ALR at 200):

> Unreasonable delay in complying with the stipulation in substance amounting to a repudiation is essential to justify rescission. It is to this end that, following breach, the innocent party gives notice fixing a reasonable time for performance of the relevant contractual obligation. The result of non-compliance with the notice is that the party in default is guilty of unreasonable delay in complying with a non-essential time stipulation. The unreasonable delay amounts to a repudiation and this justifies rescission.
>
> That was said in reference to delay beyond a stipulated date. It does not follow that delay beyond the stipulated reasonable time necessarily amounts to repudiation. But if, the stipulated reasonable time having elapsed, a notice to complete allowing a further reasonable time is given, a failure to comply provides a firm foundation for an inference of repudiation.
>
> A right to rescind is one thing; fairness in the exercise of that right is another. In some circumstances, equity asserts a jurisdiction to restrain the exercise of a right to rescind. As I attempted to explain in *Louinder v. Leis* (CLR at 532-6) a notice to complete does not make time of the essence of the contract when the contract itself does not do so, but it is a step towards lifting an equitable restraint on the exercise of a right to rescind which arises *aliunde*. Therefore, when a contract requires performance of an essential promise within a reasonable time and a valid notice to complete on or before a specified day is given by the innocent party, the significance of the notice is twofold: primarily, it fixes a day when, if the default is not remedied, the party in default will be held to have repudiated the promise; and, secondarily, it will show that, for equity's purposes, it is fair for the innocent party to exercise that right: see per Fry J in *Green v. Sevin* (1879) 13 Ch D 589 at 599, and per Isaacs J in *Maynard v. Goode* (1926) 37 CLR 529 at 538.

[41] Brennan J nonetheless proposed that repudiation may be proved by other evidence and means without proof of an effective notice to complete:

> I would not infer repudiation merely from non-registration within the time limited by the letter. However, I am unable to agree with the Full Court who, accepting that the notice was ineffectual, held that "until an effectual notice was given the delay continued but that alone was insufficient to make evident any intention on the part of [Capalaba] that it would not be bound by the contract". Repudiation may be established without proof of an effective notice to complete. The absence of an effective notice means that the other evidence must be examined to determine whether a clear inference of repudiation should be drawn, but it does not preclude the drawing of that inference.

[42] Deane and Dawson JJ, said the following on the significance of a notice:

A If, however, the innocent party gave an appropriate notice to the party in default requiring completion or performance within a reasonable time fixed by the notice, equity would not, in the event of continued default after the expiry of that further time, intervene to preclude the effective exercise of the common law right to terminate. The continued default in the face of the notice disentitled the party in breach to such equitable
B relief because it would not be inequitable for the innocent party to terminate the contract after due warning had been given of the consequence of continued default.

...

C It is important that courts treat warily in disturbing current perceptions about the effect of conveyancing precedent or practice. Notwithstanding that need for caution, the weight of past authority is debatable and clearly inadequate to justify this court in insisting upon a requirement that a notice to complete must unequivocally state that, in the event of non-compliance, the party giving the notice will treat the contract as at an
D end. That is not, of course, to suggest that a notice will be effective to make time of the essence of a contract with the consequence that the party giving the notice will be entitled to rescind in the event of non-compliance if it is inadequate to convey to a reasonable person in the position of the recipient that that is its purport and effect. The whole point of equity's intervention in relation to stipulations as to time was that, in
E the absence of express or implied contractual provision to the contrary, it regarded it as inequitable or unconscionable for a party to a contract to rescind for breach of a time stipulation without having given reasonable warning to the party in default. It seems to us, however, that, in modern circumstances, a notice will be adequate to convey such a warning if, but only if, it conveys either that the time fixed for performance is made of
F the essence of the contract or that the party giving the notice will, in the event of non-compliance, be entitled (or regard himself as entitled) to rescind. A notice, particularly one between solicitors, can convey those matters by implication.

[43] Gaudron J expounded on reasonable time for performance and on
G repudiation:

In *Perri v. Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 554-5; 41 ALR 441, Mason J pointed out that 'there is a natural reluctance on the part of courts to classify a provision which looks to the happening of an event within a reasonable time as one which makes time of the essence, more particularly when that time is implied and is not expressed'. As his
H Honour then pointed out 'it is undesirable that the rights of the parties should rest definitively and conclusively on the expiration of a reasonable time, a time notoriously difficult to predict ...'

There is no very precise formulation of the necessary import of conduct before it will be characterised as repudiatory. In *Carr* (at 349) Fullagar J
I (with whom Dixon CJ, Williams, Webb and Kitto JJ agreed) expressed the issue in terms of the only legitimate inference being that the party in breach was not going to perform the contractual obligation at all or was not going to perform it unless and until convenient so to do. His Honour

characterised (at 351) the conduct under consideration in that case as such that '[a] reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him'. The thrust of the observations in *Carr* is that for conduct to be characterised as repudiatory it should either convey an intention not to be bound at all or give rise to uncertainty as to whether the contractual obligation will be performed. But a less restricted view has developed. In *Shevill* (CLR at 625-6) Gibbs CJ (with whom Murphy and Brennan JJ agreed) referring, *inter alia*, to the decision in *Carr*, identified the manifestation of an intention 'to fulfil the contract only in a manner substantially inconsistent with [the] obligations and not in any other way' as conduct constituting repudiation. That statement was accepted as correct in *Progressive Mailing House Pty Ltd v. Tabali Pty Ltd* (1985) 157 CLR 17 at 33 and 44; 57 ALR 609. It was expressly recognised in *Carr* (at 349) that breach which did not itself entitle the other party to rescind might remain unremedied for so long and in such circumstances as to constitute repudiation. See also *Associated Newspapers Ltd v. Bancks* (1951) 83 CLR 322 at 339-40; Tabali, per Brennan J (CLR at 40).

In the present case breach occurred as soon as a reasonable time for delivery of a registrable lease had expired ...

Mere failure to deliver a registrable lease within a reasonable time of the agreed commencement date could not itself amount to the manifestation by the lessor of an intention to render performance only in a manner inconsistent with its obligation.

[44] Significantly, in *Wood Factory Pty Ltd v. Kiritos Pty Ltd* (1985) 2 NSWLR 105, it was held by Priestley JA, after His Honour's close study of the relevant law on a tenant's liability for rent and damages when a lease has come to an early end, that it is "important to recognise that progressive mailing is a decision which states clear principles of the law of leases which neither need for their authority, nor directly depend on, earlier case law ... progressive mailing is a clear root of title for the present and future law in Australia, behind which it will be unnecessary to go". And pertinent to repudiation and consequential damages, the principles of the law of leases, as enunciated in progressive mailing, were (i) that the rights, duties and liabilities of the parties to a lease fall to be determined by reference to the ordinary principles of contract law; (ii) that mere breaches of covenant do not amount to a repudiation or fundamental breach; (iii) that repudiation is where a party evinces an intention no longer to be bound by the contract or to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way, or where the party at fault is guilty of such default in performance that the breach goes so much to the root of the contract that it makes commercial performance of it impossible; (iv) that repudiation by anticipatory breach occurs if one party renounces his liabilities under it, if he evinces an intention no longer to be bound by the contract, or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way;

(v) that repudiation or fundamental breach entitles the innocent party to rescind the contract and sue for damages for loss of the bargain; (vi) that it is essential to an award of damages for loss of bargain that the defendant can no longer be required to perform his contractual obligations *in specie*; (vii) that a lessor can recover damages for loss of the benefit of a lease only where the lessee has repudiated the lease before determination of the term; (viii) that in the case of anticipatory breach, the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages; (ix) that until the promisee accepts the repudiation, the rights and obligations arising from the partial execution of the contract and causes of action that accrue from its breach continue unaffected; (x) that the promisee's acceptance of the repudiation is an essential element in the cause of action for damages for anticipatory breach; (xi) that the promisee's acceptance of the repudiation is an essential element in the cause of action for damages for anticipatory breach, as the liability in damages is the substitute for the executory obligations to which acceptance of repudiation puts an end; and (xii) that a waiver of forfeiture constitutes the lessor's election to keep the lease on foot.

[45] Repudiation, in the context of a lease, was further expounded in *Laurinda v. Capalaba*, where it was held (i) that it is more than mere delay in the registration of the lease, but if delay remains unremedied for so long, it may constitute repudiation; (ii) that the right to repudiate will arise where a party repudiates an essential promise that is at the heart of the agreement; (iii) that where an essential term is to be performed within a reasonable time, there being no stipulated day for performance, and that time passes without performance, the innocent party does not acquire a right to rescind unless the defaulting party repudiates or has repudiated his obligation to perform; (iv) that to provide a firm foundation for the inference of repudiation, it is prudent for the promisee to give a notice to complete; (v) that the significance of the notice is twofold: primarily, it fixes a day when, if the default is not remedied, the party in default will be held to have repudiated the promise; and, secondarily, it will show that, for equity's purposes, it is fair for the innocent party to exercise the right of termination (see *Sime Hok v. Soh Poh Sheng*); (vi) that repudiation may be proved by other evidence and means without proof of an effective notice to complete.

[46] The facts in the present appeal bear close resemblance to those in *Laurinda v. Capalaba*, right down even to the reliefs. But there were differences. Unlike *Laurinda v. Capalaba*, there was no finding in the instant case of repudiation by the lessor, and there was no notice by the first appellant to the respondent to register the sub-lease within a fixed time. There was a reminder from the first appellant, on 20 March 2007, to the respondent to register the sub-lease. But for the next two years, there was no enquiry whatsoever by the first appellant on the matter of the registration of the sub-lease. Then out of the blue, the first appellant terminated the agreement.

[47] As said, it was the finding of the High Court that the notice of termination was bad, on the ground that there was a tenancy at will, and that as such there was no total failure of consideration. It was also the finding of the Court of Appeal that the notice of termination was ineffective, but on the ground that it was a notice to terminate the agreement but not the tenancy at will. Suffice it to say there was no finding by the courts below that the delay in registration of the sub-lease amounted to repudiation of the agreement by the respondent. There would also be no such finding by us in the light of the following facts and circumstances. The first appellant was let into occupation long before execution of the sub-lease. The first appellant had enjoyed long and peaceful occupation of the demised premises. As far as one can tell, there were no issues between the parties over the sub-lease, notwithstanding the delay in registration of the sub-lease. The first appellant had not bothered to issue a notice fixing a reasonable time for the registration of the sub-lease, which should not be so if the registration of the sub-lease were in peril or in doubt. It would seem that the first appellant was complacent on the registration of the sub-lease, as the respondent had not evinced an intention no longer to be bound by the provisions of the agreement to register the sub-lease. Registration of the sub-lease was at the heart of the agreement. Outright repudiation of the covenant to register the sub-lease would entitle the first appellant to rescind. But on the facts, it would not seem that the registration of the sub-lease was required to be timeously performed. It would not appear that delay in registration of the sub-lease was a fundamental breach that went to the root of the agreement.

[48] In the absence of fundamental breach by the respondent, the first appellant was not entitled to terminate the agreement. Minus fundamental breach, the notice of termination amounted, even if unintended, to repudiatory breach by the first appellant. Refusal to pay rent after June 2009 plus abandonment of the demised premises wholly substantiated that the first appellant had repudiated the agreement (see *Copperart Pty Ltd v. Bayside Developments Pty Ltd* (1996) 16 WAR 396). That entitled the respondent to rescind the agreement and sue for damages. But that was not how it unravelled in the instant case. The respondent refused to accept repudiation of the agreement. Instead, the respondent elected to keep the sub-lease on foot. But by keeping the agreement on foot, the respondent was not entitled to damages for loss of bargain, as acceptance of repudiation was an essential element in an action for damages for anticipatory breach. "... it is only when the defendant ... has effectively renounced his contractual obligations that the plaintiff, if he accepts the position and brings the contract to an end, can be said to have thereby lost the benefit of the whole bargain and is entitled to loss of bargain damages" (*Morris v. Robert Jones Investments Ltd* [1994] 2 NZLR 275, 277 per Hardy Boys J). The respondent could not claim for both damages for anticipatory breach and for performance of executory obligations. But both were awarded by the courts below, which would have to be put right.

[49] The finding by the courts below that it was a tenancy at will would also have to be put right. The first appellant had long been in occupation of the demised premises and paid the rent reserved which was accepted by the respondent. There was a relationship of landlord and tenant between the parties that was apparently regulated, for both parties conducted themselves as so bound, by the terms of the unregistered sub-lease. "The essence (of a tenancy at will] is that it should be determinable at the will of either party ..." (*Haji Taib v. Ismail* [1971] 1 LNS 37; [1971] 2 MLJ 36 per Syed Agil Barakbah J, as he then was). Since it was regulated by the terms of the unregistered sub-lease, the relationship between the parties could not be determinable at the will of either first appellant or respondent. Therefore, the relationship was not, for it was beyond, a tenancy at will (see *Saraswathy Ammal & Anor v. Central Bank Of Malaya Ltd* [1959] 1 LNS 91; [1960] 1 MLJ 8, where the definition of "tenancy at will" in *Hill and Redman,* 10th edn., at pp. 14 and 16, was cited). "In *York House Proprietary Ltd v. Federal Commission Of Taxation* (1930) 43 CLR 427 at 435-436, Knox CJ and Stark J observed that an unregistered agreement for lease is not void, and may confer equitable claims or interests and that, if a court of equity would compel specific performance of an agreement for a lease by the execution of a lease, the matter should be treated as if such a lease had been granted and was actually in existence" (*Re Oliver Brown Pty Ltd* (No 2) – BC201210322 per Black J). "Where there has been performance (and especially where a tenant has gone into possession under an agreement to lease) a court of equity will not usually refuse to decree specific performance ..." (*Lin Nyuk Chan v. Wong Sz Tsin* [1964] 1 LNS 94; [1964] MLJ 200 per Wylie CJ (Borneo), delivering the judgment of the court). Now given further that the first appellant had expended substantial sums towards renovation of the demised premises, and sublet the demised premises, all that with the consent of the respondent, the circumstances were clearly such that equity could compel specific performance of the sub-lease which would be treated as if registered. The circumstances were clearly such that the sub-lease, although not registered in law, could be treated as a sub-lease in equity and could be enforced by the purchaser, by a decree of specific performance, against the proprietor.

[50] But for whatever reasons, the first appellant chose not to pursue a decree for specific performance. Instead, it was the respondent who sought to enforce the agreement. While both courts below declared that the agreement was valid and binding on the first appellant, the Court of Appeal went one step further in holding that there was an equitable lease, in the sense that the agreement must be specifically performed by the first appellant. *Hill and Redman's Guide to Landlord and Tenant Law* at para. 2.63 observed "Upon the refusal or omission of either party to an agreement for a lease to perform the agreement on his part, the other is usually entitled to maintain an action for specific performance." But this principle of mutuality is no longer given

the weight that it traditionally was (see *New Dennis Arther & Anor v. Greesh Ghai Monty & Anor* [2012] 3 SLR 908, at pp. 914-915, per Choo Han Teck J who quoted the following from *Snell's Equity* 32nd edn. paras. 17-011: "In most cases, a monetary remedy of damages or an action for an agreed sum will be an adequate remedy for breach of contract for the payment of money ..."). The availability of specific performance generally of the covenants in an unregistered lease at the suit of the lessor is a matter of doubt (see *Chan v. Cresdon Pty Ltd* [1989] 168 CLR 242, at pp. 255-256). Pertinently, s. 11(1)(c) of the Specific Relief Act 1950 provides that "except as otherwise provided in this chapter, the specific performance of any contract may, in the discretion of the court, be enforced when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief" (see *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154; [1989] 2 MLJ 155). The interest of the respondent was solely financial. Besides, it was the tenant (first appellant) who acquired the equity to protect his occupation. It would be unjust to turn the equitable lease for the full term against the tenant to secure rent for the proprietor (respondent). On balance, it would not seem that specific performance could be granted against the first appellant. Rather, where there is an equitable lease, the rights of the proprietor are as per the lease, *albeit* unregistered. In *Walsh v. Lonsdale* (1882) 21 Ch D 9, Jessel MR, said:

> There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry." That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

[51] "If the agreement can be specifically enforced, the landlord has the same rights as if a lease had been granted, and the tenant is protected in the same way as if a lease had been granted" (*York House Proprietary Ltd v. Federal Commissioner of Taxation, supra* at 436 per Knox CJ and Starke J). Upon the tenant's breach or default, the proprietor has the rights under the unregistered

lease or sub-lease. Under cl. 7.0 of the agreement, the respondent had the right to forfeit the sub-lease and to file action in respect of any antecedent breach. The respondent should seek out other tenant/s. The respondent should sue for damages in accordance with ordinary contractual principles, that is after due mitigation, to represent the loss of bargain and to substitute for the performance by the first appellant. "Bearing in mind that the ordinary principles of contract apply, a useful starting point is the statement in *McGregor on Damages*, 15th edn., at para. 29, where it said: "the basic loss to the other party is the market value of the benefit of which he has been deprived though the breach. Put shortly, the plaintiff is entitled to compensation for the loss of his bargain" "(*Nangus Pty Ltd v. Charles Donovan Pty Ltd (In Liquidation)* [1989] VR 184 per Kaye and Southwell JJ). "In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) ... "(*Gates v. City Mutual Life Assurance Society Ltd* (1985-1986) 160 CLR 1 at 11 per Mason, Wilson and Dawson JJ). "It was from this abandonment of the lease and repudiation of the contract that the damages naturally flowed" (*Hughes v. NLS Pty Ltd* [1966] WAR 100 per Jackson J). "... upon the repudiation of the agreement to lease, the acceptance thereof and the termination of the agreement, Bayside became entitled to damages for the breach of the agreement, assessed in the ordinary way by the ordinary contractual measure. The damages to be awarded are for the loss of the bargain: *Progressive Mailing House Pty Ltd v. Tabali Pty Ltd*. The measure of damages is taken to be the difference between the benefits in rental and outgoings (in this case) which Bayside would have received for the balance of the term, less any benefit of that kind which it has in fact received by re-letting the premises pursuant to its obligation to mitigate its loss, subject to a discount in an appropriate case (which is not this case) for the acceleration of the compensation obtained: *Hughes v. NLS Pty Ltd* [1966] WAR 100. It was upon that basis that learned trial judge in this case proceeded to make in assessment of damages" (*Copperart, supra* at 413 per Murray J).

[52] The loss that the respondent suffered by reason of repudiation was the periodic tenancy. Both courts below held, but gave no reason why, that it was a tenancy from year to year. In *Lee Ah Low*, where the unregistered lease was for a term of 80 years, the Federal Court held that it was a yearly tenancy by reason of the equity in favour of the tenant by his going into possession. In *Tan Khien Toong & Ors v. Hong Bee & Co* [1987] 2 CLJ 17; [1987] CLJ (Rep) 353, the Federal Court per Hashim Yeop A Sani FCJ, as he then was, held that "Since the respondents here had failed to show that an equity had been created in their favour what becomes evident from the undisputed facts is a monthly tenancy terminable with one month's notice". In the instant case, as there was an equity in favour of the first appellant, it could not be a tenancy from month to month. In any case, "the courts have a great

inclination to make every tenancy a holding from year to year (*Richardson v. Langridge* (1811) 4 Taunt 128). "At an early stage of the history of tenancies from year to year a presumption arose in favour of that tenure ... This presumption has continued and still prevails ... it follows that at law, whatever may be the position in equity, the respondent would be considered a tenant from year to year" (*Moore v. Dimond* [1929] 43 CLR 105, 116-117 per Knox CJ, Rich and Dixon JJ).

[53] "At common law the tenancy from year to year was liable to termination by notice to quit before the term contracted for: *Moore v. Dimond*" (*Chan v. Cresdon Pty Ltd* [1989] 168 CLR 242 per Mason CJ, Brennan, Deane and McHugh JJ). "Where a tenancy is created by express agreement, the general rule at common law is that half a year's notice must be given expiring at the end of the first or some other year of the tenancy ... The same rule applies where a tenancy from year to year is implied by law from the payment and acceptance of rent, or from other circumstances eg where a person entered under a void lease ..." (*Woodfall: Landlord and Tenant* vol. 1 at para. 17.206). A yearly tenant was entitled to six months' notice to quit at the end of the year (*Birch v. Wright* [1775-1802] All ER Rep 41 per Buller J). In *Mayo v. Joyce* [1920] 1 KB 824, it was held by Sankey J that the ordinary method of terminating a yearly tenancy was by a six months' notice expiring on the date of the commencement of the tenancy. In *Stokes v. Tracey* (1) [1920] 2 IR 444, Sir James Campbell said it is "... an implied obligation on either party to terminate the tenancy by a definite period of notice, as in the case of a yearly tenancy, where either party could, in the absence of agreement, determine the tenancy by six months' notice ...". "For tenancies from year to year ... where parties have not expressly agreed on any period of notice, the law implies at least a half-year's notice expiring at the end of one completed year of the tenancy – *Sidebotham v. Holland* (1895) 1 QB 378. Once a valid notice is given, the tenancy automatically ends on the last day of the yearly period – *Yeo Chiang Swee v. GF Strickland* [1946] 1 LNS 39; (1946) 12 MLJ 7" (*Landlord and Tenant* by Lye Lin Heng at pp. 244-245). Accordingly, the respondent was entitled to six months' notice of termination of the periodic tenancy from year to year. A period of six months should also be reasonable time for the respondent to secure another tenant/s, as the demised premises are located right in the old city, where landed properties were and are much sought after. But the notice of the first appellant which effectively terminated both agreement and periodic tenancy (see *Leitz Leeholme Stud Pty Ltd v. Robinson* [1977] 2 NSWLR 544, 547 per Glass JA) was five months short.

[54] We now answer the leave question as follows. A lease or sub-lease (exceeding three years) is not rendered void by reason of non-registration. A lease or sub-lease (exceeding three years) is imperfect without registration. Unless perfected, it will not operate to transfer title to the lessee or sub-lessee. It is nonetheless an agreement for a lease. An agreement for a

A lease does not create a relationship of landlord and tenant. But if the tenant is let into possession under the imperfect lease or sub-lease, he becomes a tenant at will (for further reading on the creation of a tenancy at will, see *Megarry & Wade, supra* at para. 17-102). A tenancy at will, is determinable at the will of either party, and being such it cannot co-exist with a periodic B tenancy or an equitable lease. When the tenant pays or expressly agrees to pay rent, the tenancy at will changes into a periodic tenancy upon the terms of the intended lease or sub-lease, that is, from year to year or for other periodic period, according to the computation of the rent. Where appropriate, equity may treat an agreement for lease as an equitable lease, C that is, treat the unregistered lease as registered, and compel specific performance against the proprietor.

[55] The "lease" which was acquired by the first appellant could not be specifically enforced against the first appellant for the rent for the full term. In the final analysis, the respondent was only entitled to damages *in lieu* of D notice of termination of the periodic tenancy from year to year.

[56] For the above reasons, we (on 18 March 2015, Mohamed Apandi Ali FCJ, as he then was, now AG, agreed with the draft of this judgment) unanimously allow the appeal, but only in part. We vary the orders of the courts below to the effect and extent that we allow the application for E summary judgment and order the appellants to only pay the sum of RM1.275m, it being the rent payable for the months of July 2009 to November 2009 *in lieu* of notice. The sum of RM1.275m is to be defrayed from the security deposit of RM2.1m, with the balance remaining to be refunded to the first appellant, together with interest at the rate of 4% per F annum from 1 December 2009 to date of refund. Finally, we order the rest of the claim of the first appellant to be dismissed, as the claim for renovation and other costs would not stand in the face of the summary judgment on the counterclaim.

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